
No. 2371

IN THE
**United States Circuit
Court of Appeals**

NINTH CIRCUIT

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States
for the District of Oregon

Appellant's Brief

ROBERT J. UPTON,
Fenton Building, Portland, Oregon

ST. RAYNER & ST. RAYNER,
Chamber of Commerce Building, Portland, Oregon
Solicitors for Appellant

No. 2371

IN THE
United States Circuit Court
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NINTH CIRCUIT

CHRISTIAN HERRMANN,

Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKINBEARD, PHILURA CLINKINBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MAT-TIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COM-PANY, a corporation, trustee, TITLE GUAR-ANTEE AND ABSTRACT COMPANY, a corporation, EAST MARSHFIELD LAND COMPANY, a corporation, EASTSIDE LAND COMPANY, a corporation, ANDREW MAS-TERS, CHARLES H. CURTIS, ANNA JOHANSEN, JOHN WALL, MARY PEN-NOCK, ARTHUR B. SANDOHL, W. R.

HAINES and LOUISE B. HAINES, HARVEY SMITH, GEORGE CLINKINBEARD, ANNA D. CLINKINBEARD, CHAPMAN L. PENNOCK, ARNE P. HUSBY, A. E. CAVANAUGH, M. A. McLAGGEN and MINNIE McLAGGEN, FIRST TRUST AND SAVINGS BANK OF COOS BAY, a corporation, J. W. VINGARD, MARY A. PETERSON, DORIS L. SENGSTACKEN, VICTOR ALTO, L. GRAYCE GOULD, CORNELIUS WOODRUFF, WILLIAM J. LEATON, JOHN F. BANE, A. W. NEAL, A. R. WELCH, WILLIAM VAUGHN, WILLIAM H. PAYNE, HILDA FREDERICKSON, ELIZABETH SCHIEFFELE, ANTHONY STAMBUCK, GEORGE H. ELLIOT, NELLIE CHANDLER, T. V. JOHNSON, LISI ALTO, J. T. HERRETT,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

STATEMENT.

This suit was instituted by Christian Herrmann in the District Court of the United States, for the District of Oregon, for the cancellation of certain deeds; for the recovery of a certain tract of 280 acres of land, known as the "Holcomb" tract, situate in Coos County, Oregon; and for an accounting. Mr. Herrmann predicated the right of relief prayed

for on the fact that the defendant, John F. Hall, while acting as his and his wife's agent for the sale and conveyance of said land, under a general power of attorney, sold and transferred the same to a syndicate or an association of which said agent was himself a member, without their knowledge or consent. After hearing the evidence, the trial court rendered an opinion and decree dismissing complainant's Bill of Complaint, from which this appeal is taken.

The record shows that the land in question was, for many years, owned by Dora Norman, a widow.

During the year 1900, Dora Norman left her home in Marshfield, Coos County, Oregon, and went to Germany, where she made her home and resided until the time of her death, in 1905.

Previous to the time of her departure from Marshfield, Dora Norman placed the control and management of all her land and other property in Coos County, of which she owned considerable, in the hands of John F. Hall, an attorney, of Marshfield, in whom she reposed great trust and confidence, and he acted as her agent and confidential adviser in respect thereof from that time until the date of her death.

On the 8th of June, 1902, Dora Norman and appellant, Christian Herrmann, were married, in Germany.

On November 7th, 1903, Mr. and Mrs. Hermann made and delivered a general power of attorney to Hall, whereby they formally appointed him their agent, and duly authorized and empowered him to sell and convey their lands, etc., for them, and to make, execute and deliver deeds, etc., therefor, in their names, places and stead. ("Exhibit A," T., p. 31.)

Mrs. Herrmann was desirous of disposing of the land in question herein, and she directed Hall, in her letters, to sell it for her. Considerable correspondence passed between them in regard thereto, from the time Mrs. Herrmann went to Germany until the land was conveyed by Hall, in 1905, and the history of this case, in so far as the part played by Mrs. Herrmann and Hall is concerned, is mostly contained in the letters that passed between them during that time.

The first letter in which Hall informed Mrs. Herrmann that he had a prospect of selling the land was dated May 19th, 1905. He wrote (T., p. 220, 221):

"Hall & Hall,
Attorneys at Law,
Marshfield, Oregon.

May 19, 1905.

Dora Herrmann,
Tedan Street, Hildesheim,
Hanover, Germany.

Dear Madam:

* * *
 “ * * * There is now considerable talk
 about land and we have a good prospect of
 selling the Holcomb tract for four thousand
 dollars. * * * ”

“HALL & HALL.”

Mrs. Hermann replied to this letter on June 12,
 1905, as follows (T., p. 222-223) :

“Mr. John Hall,

Marshfield.

June 12, 1905.

* * *

“I am also satisfied with the sale of the
 Holcomb land for four thousand dollars. You
 would really oblige me very much if you would
 apply to the affair very energetically, that now
 at length all my possessions there would be sold.

* * * ”

“ * * * I am looking forward to an
 answer soon. *Please do give me a detailed ac-*
count about everything. * * * ”

* * *

“DORA HERRMANN.”

Again, on August 12, 1905, Hall addressed the
 following letter to Mrs. Herrmann (T., p. 91-92) :

“Hall & Hall,

Attorneys at Law,

Marshfield, Oregon.

August 12, 1905.

Dora Herrmann, 16 Tedanstrasje,
Hildesheim, Germany.

Dear Madam:

* * *

“ * * * The Holcomb claim, I guess, is sold. Parties have agreed to take the same, and the abstract is now being made, and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September.”

* * *

“HALL & HALL.”

On August 31, 1905, Mr. Hall next wrote Mrs. Herrmann, notifying her that he had sold the Holcomb tract, as follows (T., p. 90):

“Dora Herrmann,
Hildesheim, Germany.

August 31, 1905.

Dear Madame:

“Enclosed herewith find check for the sum of \$1694.00. We have sold the Holcomb land for \$4000.00 net above commission, and our fee for foreclosing the mortgage. Have taken a mortgage for \$2200.00, payable one year after date, at 6% per annum. Will take payments against that and all other property, together at any time for \$100.00 and upwards.

“We retain a sufficient sum to pay the taxes with the cost of abstract, and remit the balance received herewith. * * * ”

* * *

“HALL & HALL.”

On September 18, 1905, Mrs. Herrmann died intestate, leaving her husband, Christian Herrmann, complainant herein, her sole heir at law, and he thereupon became the owner of all her rights, title and interest in and to the land in question herein. (T., p. 126.)

The last two mentioned letters of Hall were received by Mr. Herrmann on the day of his wife's death, or immediately thereafter. And after that time, Herrmann and Hall continued the correspondence in regard to this property.

On October 8, 1905, Hall wrote Mrs. Herrmann (not yet having learned of her death) as follows (T., p. 95):

"Dora Herrmann,

Dear Madam:

"Herewith you receive a check for the sum of \$370.00, as payment on account of the Holcomb property and mortgage to examine.

* * * "

* * *

"HALL & HALL."

Mr. Herrmann testified at the trial in the court below that, although this letter recited that it contained "a mortgage to examine," it did not in fact contain any mortgage. (T., p. 95.)

On November 8, 1905, Herrmann replied to all of Hall's letters, notifying him of his wife's death,

and expressing his confidence and reliance in Hall, as follows (T., p. 93-94):

“Hildesheim, the 8th November, 1905.

Mr. John Hall, Marshfield.

“I received all your writings from the 12th and 31st August, also those from 28th and 29th September, 1905. Let me first tell you of the very sad eventment that took place in the month of September. My dear wife was not more able to answer your writings; she became suddenly ill, suffered a whole month from heart disease. * * * She died in September. * * * *My whole confidence belongs to you, sir*, just as it was with my wife, and I declare that I am entirely satisfied with all you did in arranging affairs. * * * I am very satisfied also concerning the Holcomb claim that it is sold. * * * ”

* * *

“CHRISTIAN HERRMANN.”

All Mr. Herrmann's letters were written with the aid of an interpreter.)

Hall again wrote on November 28, 1905. He made but brief reference, however, to the Holcomb land. His letter reads (T., p. 96):

“November 28, 1905.

Mr. Christian Herrmann:

“I have received your letter of November 8th and am very sorry to hear of the death of your

dear wife and extend my sincerest sympathy in your bereavement. * * * Then you have yet of the accounts of the Holcomb land mortgage about \$1800.00. * * * ”

* * *

“HALL & HALL.”

Hall had not stated, in any of his letters, to whom he had sold the land in question, nor any of the facts concerning the transaction. Herrmann, being desirous of knowing what had been done with the property, therefore, thereafter wrote Hall the following letter (T., p. 223-226):

“Dear Sir:

“I received your letter of the 28th November (1905) and thank you very much for all the sympathy you take in my bereavement, also for all the explanations you give about the property left to me by my dear wife. * * * ”

* * *

“ * * * *Would you send me a copy of the contracts over the sales of the Holcomb land and the Blanco property certified by the Clerk of the Court?*

* * *

“CH. HERRMANN.”

And again, in January, 1906, Hermann wrote Hall, requesting the latter to give him information concerning the sale of the Holcomb land. He wrote (T., p. 98-100):

“Hildesheim, January —, 1906.

Mr. John Hall, Marshfield, Oregon.

Dear Sir:

“In possession of your esteemed letter of 28 November I first express to you my best thanks for your explicit information.”

* * *

“Naturally you must know what is necessary to represent my interests and *I therefore place my whole confidence at your command.*

* * * ”

“*You will oblige me very much if you always would give me a clear report over everything, as I do not understand conditions and customs there at all, and it is very hard to find my way and to express myself when you send me to (too) short abbreviated reports (statements).* * * * ”

“ * * * Pray for more explicit reports to give me some kind of a clear view point of the conditions existing. *I kindly ask you to send me a sworn affidavit of the contracts concerning the sale of the Holcomb lands.* * * * ”

* * *

“CHRS. HERRMANN.”

On February 19, 1906, Hall replied, but did not give the requested information (T., p. 100):

“February 19, 1906.

Mr. Christian Herrmann:”

* * *

“ * * * Our probate requirements of the

estate concerning the Holcomb property contracts are hereto attached. We attach hereto a copy of the accounts together with endorsements of the same. * * * ”

The only instruments “attached” to this letter were: A copy of a promissory note of the Title Guaranty & Abstract Co. and a purported statement of account. (T., p. 104.)

Both Mrs. Herrmann, during her life time, and Mr. Herrmann repeatedly requested Hall to give them specific information concerning the sale of the Holcomb land. But Hall studiously avoided giving them any information whatever in regard thereto, other than mere vague statements to the effect that he had sold it for forty-four hundred dollars, of which one-half was paid in cash and the balance secured by a mortgage due in one year. He never sent them copies of the deed, mortgage or contracts, as requested (T., p. 142), nor did he disclose to them, in any way, any of the facts or circumstances whatever concerning the transaction, other than as indicated. He never gave them even a hint as to who the real purchasers of the tract were. (T., p. 249, et seq.) And neither Mr. nor Mrs. Herrmann ever learned, either from Hall or from any other source who the purchasers of it were, nor the facts concerning the sale, until about the year 1911, after Hermann came to the United States, and instituted an inquiry, as will be shown hereinafter. (T., p. 143, et seq.)

After the note and mortgage, which had been given to secure the deferred payment of one-half the purchase price of the land, became due, Hall wrote Herrmann various excuses for its non-payment. On October 18, 1907, more than a year after the maturity of the obligation, Hall wrote that it had not been paid because there was some kind of "a defect" in the title, and that the mortgagor, therefore, refused to pay. (T., p. 109-110.) About five months later, Hall again wrote that he had threatened the owners of the land with suit unless they paid the mortgage, and further stated: "But we have settled by agreeing to allow \$250.00 on the interest." (T., p. 111.) And two months thereafter, on November 14, 1908, he gave Herrmann a new excuse. He wrote: "The land which the mortgage covers is now under litigation before the U. S. Land Department, and we can do nothing until this matter is settled. We have everything prepared for foreclosure, but there is an attempt made by a party to file a homestead claim on the land. The party who is filing the claim says that the land still belongs to the Government and is contesting the rights of the other claimants. We will hurry the matter up as fast as we can but presume you understand that anything in the hands of the Government Agents moves very slowly, and we can do nothing until after the litigation is settled." (T., p. 114.) And that was the last that Herrmann heard from Hall in regard to the payment of this mortgage.

During the month of March, 1909, Herrmann, for the first time, came to this country from Germany, and in April of the same year he arrived in Marshfield, Oregon. (T., p. 116.) He emigrated from Germany with the intent of making his future home in the United States. At the time of his arrival, he was ignorant of the English language, and knew nothing about the laws or customs of this country or concerning our methods or manner of doing business. In fact, he knew but very little about business affairs of any kind. He had the utmost confidence in his agent, Hall, and relied implicitly on everything that Hall told him regarding his property and business affairs, and trusted him in everything that he did, practically without question, both before he came to this country and for a long time thereafter—until he became more familiar with our language and was able to communicate with other people, and until he became a little better acquainted with Hall. (T., p. 124, et seq.; T., p. 129, et seq.)

After coming to Marshfield, Herrmann made various efforts to obtain a statement from Hall concerning his property and affairs, but with little success. Finally, during the early part of the year 1911, he sent a Mr. Reigard, an attorney, of Marshfield, to Hall, for the purpose of demanding a final statement and settlement. (T., p. 116.) And, in response thereto, in May or June, 1911, Hall gave Herrmann what purported to be a statement of all his affairs, dating from January 1, 1905, up to and

including February 4, 1910, a copy of which is set forth in full in the Transcript herein, on page 117, marked "Plaintiff's Exhibit 15."

Herrmann was not satisfied with this statement, for the reason that it was not sufficiently definite and because it contained no account of nor reference to the matter of the sale of the Holcomb tract. He, therefore, demanded another statement. And, in response thereto, Hall, on the 23d of June, 1911, gave him a second report, dating from the 1st of August, 1905, up to and including the 7th of November of the same year, a copy of which is set forth in full in the Transcript on page 119, marked "Plaintiff's Exhibit 16."

In examining the second statement, Hermann's attention was attracted and his curiosity aroused by the following very cunningly worded item, and it was from this that he received his first intimation as to whom Hall had sold the Holcomb tract, and of Hall's duplicity, to-wit:

* * *	1905	Aug. 1.....	\$
		"	
		" 4.....	
		"	
		" 16.....	
		"	
		" J. J. Clinkinbeard..	366.65
		" S. C. Rogers.....	366.65
		" Others.....	1,466.70
		Sept. 1.....	
		" 26.....	

The meaning this innocent appearing little item conveyed to Herrmann is best related in his own

language, in his testimony given before the trial court, as follows (T., p. 120, et seq.) :

Q. I notice in here, Mr. Herrmann, in this Plaintiff's Exhibit 16, a statement of J. J. Clinkinbeard, \$336.65, S. C. Rogers \$336.65, and the word "*others*" \$1466.70. Did Mr. Hall ever explain to you what these items meant?

A. No, never.

Q. Did you understand, or were you ever given any information as to what they meant?

A. No.

Q. And what time was it you received Plaintiff's Exhibit 16?

A. In June, 1911.

* * *

Q. And then after the Exhibit 16 was received by you, how long was it until you got the affidavit from Mr. Clinkinbeard that is in evidence?

A. I must explain you bye and bye. I cannot tell you the date.

Q. No, you can explain to the court now.

A. After I found the Clinkinbeard \$366.65, Rogers \$366.65, and *others* \$1466.70, I don't know what it is; I never got money under those names, and then I figure out. I found the sum

of \$2200 that they had paid me in cash for this Holcomb land.

Q. What do you mean by this \$2200.00?

Court: That is what he said they paid him in cash for the Holcomb land.

A. For the Holcomb land, I got \$2200.00, that is half payment.

Q. In other words, you found that these three items in "Exhibit 16," under the head of Clinkinbeard, Rogers and "*others*," aggregated \$2200.00. Is that what you mean?

A. Yes, sir; I makes addition and find out \$2200.00, and then I make a belief that must be the same \$2200.00, that came to me from the Holcomb land. Therefore, I told Mr. Reigard to make investigation of Mr. Clinkinbeard and Mr. Rogers, what he has to do with this sum that he pay to Mr. Hall, and Mr. Reigard telephoned to both, and Mr. Rogers had no time. Mr. Clinkinbeard came into Mr. Reigard's office, and then make this affidavit.

Q. That is how you found it out?

A. Yes.

Q. And that is the first time—or what was the first time that you discovered that that was the situation in regard to whom this land had been sold by Mr. Hall?

A. After this affidavit.

The affidavit referred to by Hermann, which Reigard obtained from Clinkinbeard, reads as follows (T., p. 426):

“State of Oregon, County of Coos—ss.

“I, J. J. Clinkinbeard, being first duly sworn, on oath, depose and say that I am one of the purchasers of the 280 acres of land known as Eastside, Marshfield, further described as the northeast quarter, and lot two, and the west one-half of the southeast quarter of Section thirty-six in Township twenty-five, Range thirteen West of the Willamette Meridian, Coos County, Oregon, *jointly with* Henry Sengstacken, S. C. Rogers, L. D. Smith, D. L. Rood, *John F. Hall*; but that as I recollect I never received a deed of conveyance for the same, but it was held in trust by some other person for me. I afterwards sold all my interest in said premises to L. D. Smith for about \$2250.00 and that I now claim no interest of any kind whatever in or to said premises.

(Signed) “J. J. CLINKINBEARD.

“Subscribed and sworn to before me this 26th day of June, 1911.

(Notarial Seal.)

“CHAS. I. REIGARD,
“Notary Public for Oregon.”

The reason why Hall had never let him know who the purchasers of the Holcomb tract were was thus made clear to Herrmann. Hall himself and a little group of his friends were the purchasers.

After this discovery, the following facts were further developed:

Prior to August 31, 1905, Henry Sengstacken and L. D. Smith, friends of Hall, organized and promoted what they termed a "syndicate," for the purpose of buying this land. This syndicate or association was composed of the following persons, all of whom were residents of the little town of Marshfield and close friends of long standing, namely: Henry Sengstacken, L. D. Smith, John F. Hall, J. J. Clinkinbeard, S. C. Rogers and D. L. Rood.

On August 31, 1905, Hall, under his power of attorney, in consideration of a stated sum of \$4400.00, executed and delivered a deed of conveyance of the land to the Title Guarantee & Abstract Company, an Oregon corporation, of which Sengstacken was president and general manager, in trust for the members of the syndicate or association aforesaid. Only one-half the purchase price was subscribed and paid by the syndicate, and the Title Guarantee & Abstract Company, trustee, gave its note and mortgage for the sum of \$2200.00, payable in one year to the order of Mrs. Hermann, back to Hall, to secure the deferred payment.

The Title Guarantee & Abstract Company, trustee, thereupon issued a memorandum or certificate to each of the members of the syndicate, evidencing their respective undivided equitable interests in the land so held in trust by it for them. The company issued a certificate to Sengstacken for a three-twelfths interest, to Smith for a three-twelfths interest, to Hall for a one-twelfth interest, to Clinkinbeard for a two-twelfths interest, to Rogers for a two-twelfths interest, and to Rood for a one-twelfth interest.

Thereafter, Rogers and Rood assigned their certificates to Sengstacken. (T., p. 316.)

Hall, together with his brother and law partner, James T. Hall, to whom he had given a one-half interest in his share, assigned his certificate to one W. O. Christensen. And Christensen, in turn, also assigned to Sengstacken. (T., p. 316.)

Clinkinbeard assigned his certificate to Smith. (T., p. 279-280.)

Sengstacken thereafter re-assigned the certificate he had acquired from Rood to one Z. T. Siglin. (T., p. 316.)

Rogers and Rood received something like four times what they had paid for their interest from Sengstacken. (T., p. 341; T., p. 376.) And Clinkinbeard received a like amount from Smith. (T., p. 362.)

And thereafter, Sengstacken, Smith and Siglin, having acquired all the equitable interests of the other members of the syndicate, organized and incorporated the East Side Land Company, under the laws of Oregon, for the purpose of receiving and holding title of the land for themselves; and they assigned all their equitable interests therein to it. (T., p. 299,312. Defendants' Answer, T., p. 68.)

And after the organization of the East Side Land Company, Sengstacken, Smith and Siglin caused the Title Guarantee & Abstract Company, trustee, to convey the legal title of the land to the former company. And the East Side Land Company now claims to be the owner thereof. (T., p. 68. Defendant's Answer.)

All the stock of the East Side Land Company, at the time of its organization, was issued to Sengstacken, Smith and Siglin, and they now own and hold all the stock of said company, in the following proportions, to-wit: Sengstacken, six-twelfths thereof; Smith five-twelfths thereof, and Siglin one-twelfth thereof. (T., p. 312.) Sengstacken was elected president of the company, and the other offices were filled by Smith and Siglin.

While the Title Guarantee & Abstract Company, trustee, still held the title of the Holcomb tract, it platted and dedicated it into two townsites, which were called "East Side" and "Home Addition to East Side." And that company, and also the East

Side Land Company, after the conveyance to it, executed deeds of lots in the two townsites to the following named persons: Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur Sandohl, W. R. Haines, Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Frederickson, Elizabeth Schieffele, Anthony Stambuck, George H. Elliot, Nellie Chandler, T. V. Johnson, Lisa Alto and J. T. Herrett.

After Mr. Herrmann became apprised of the facts above substantially related, he tendered back to the Title Guarantee & Abstract Company, trustee, the purchase price of the land, together with interest thereon, at the legal rate, from the date of the conveyance up to and including the date of tender, and demanded a reconveyance of the property. He also made similar demands on Sengstacken, Smith, Hall, Rogers, Clinkinbeard, Rood, Siglin, Christianson and James T. Hall, also upon the East Side Land Company, and also upon the above named lot claimants. All which demands were refused.

And thereafter, on the 1st of March, 1912, Mr. Herrmann filed his Bill of Complaint herein against the above named persons and corporations.

BILL OF COMPLAINT.

After setting forth the substance of the facts above related, the Bill of Complaint charges, among other things, as follows (T., p. 7):

“IX.

“Your orator further represents and alleges that during the month of August, 1905, while said Dora Herrmann was lying sick in her last illness, in her home in Germany, and totally unable to transact any business, and in a weakened mental and physical condition so that she had not sufficient strength and intelligence to understand or attend to her affairs, said defendants, John F. Hall, L. L. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin and S. C. Rogers, confederating and conspiring together and with the said defendant Title Guarantee and Abstract Company, for the purpose of cheating and defrauding the said Dora Herrmann and depriving her of said property and acquiring the same for themselves for a grossly inadequate price, and taking advantage of the ignorance of the said Dora Herrmann, of the condition and value of the said property and the faith and confidence reposed in said defendant John F. Hall by said Dora Herrmann as her attorney in fact and legal adviser and agent, and of his intimate knowledge of her affairs, said defendants and each of them, well knowing the value of said described property and the confidential

relation which said defendant John F. Hall bore to the said Dora Herrmann as her attorney in fact and confidential adviser, fraudulently, treacherously, corruptly and wrongfully devised and concocted the wicked, fraudulent and corrupt plan and scheme, with intent to cheat, wrong and defraud the said Dora Herrmann the same for a grossly inadequate sum and value, as follows, to-wit: That the said defendant Hall should sell, as said attorney in fact, the whole of said property described in paragraph V of this Bill of Complaint to the said defendants, John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, S. C. Rogers, James T. Hall and Z. T. Siglin, and for the purpose of covering up, concealing and hiding his own connection with and interest in said transaction, and to deceive said Dora Herrmann and your orator as to the real facts in connection therewith, it was further agreed by and between said defendants that the said defendant John F. Hall should convey said described property by deed to the defendant Title Guarantee and Abstract Company, trustee, and sign the names of the said Dora Herrmann and your orator thereto by their attorney in fact, the defendant John F. Hall; that the purchase price named in said deed was the sum of \$4400.00, and it was further agreed by and between said defendants that the said defendant John F. Hall was to report and represent to said Dora Herrmann and your orator that said sum of \$4400.00 was all that said property was

reasonably worth, and that the same was the full consideration that he was receiving therefor; that in truth and in fact the said defendants, John F. Hall, L. D. Smith, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, J. J. Clinkinbeard, D. L. Rood, Henry Sengstacken, James T. Hall, Z. T. Siglin and S. C. Rogers were not to pay for said land more than \$2200.00, said payments to be made as follows: Said defendants, John F. Hall and James T. Hall, were to pay \$366.66 for a two-twelfths interest therein; said defendant L. D. Smith was to pay \$549.99 for a three-twelfths interest therein; said defendant J. J. Clinkinbeard was to pay \$366.66 for a two-twelfths interest therein; said defendant D. L. Rood was to pay \$183.33 for a one-twelfth interest therein; said Henry Sengstacken was to pay \$549.99 for a three-twelfths interest therein, and said S. C. Rogers was to pay \$183.33 for a one-twelfth interest therein; and said defendants were to share in said property, each in the proportion in which said payments above set out were to be made, and that said defendant Title Guarantee and Abstract Company was to issue to each of said defendants a trust certificate or memorandum signed by said defendant Title Guarantee and Abstract Company, certifying their interests as herein alleged."

"X.

"That pursuant to said plan and scheme so concocted and contrived by said defendants, and

with the intent to cheat, wrong and defraud said Dora Herrmann and your orator out of said property and obtain the same for a grossly inadequate sum and value, said defendant John F. Hall, without the knowledge of the said Dora Herrmann or your orator, did thereafter, on the 30th of August, 1905, make, execute and deliver to said Title Guarantee and Abstract Company, trustee, a pretended deed of conveyance, and signed the names of said Dora Herrmann and your orator thereto by John F. Hall, attorney in fact, thereby purporting and pretending to convey to said defendant Title Guarantee and Abstract Company all the above described real estate, a copy of which said deed is hereto attached, marked Exhibit "B" and hereby made a part of this Bill of Complaint, word for word, the same as if fully set out herein; that said deed was so made and executed as to entitle the same to be recorded, and the same was thereafter recorded on the first day of September, 1905, on pages 336-7 of Book 41 of Records of Deeds in the office of the County Clerk and Recorder of Conveyances of the county of Coos, State of Oregon; that all of the aforesaid defendants except the defendant John F. Hall and said James T. Hall paid to said defendant John F. Hall each his proportion of said \$2200.00, but John F. Hall, with the knowledge and consent of all of his said hereinbefore mentioned conspirators, paid nothing for his interest in said land, but in or about the month of September, 1905, said defendant John F. Hall sent a writ-

ten statement to the said Dora Herrmann in Germany, which was received by your orator after her death, falsely representing and reporting that he had sold said property to the defendant Title Guarantee and Abstract Company and had received for it the sum of \$2200.00 and a purchase money mortgage in the sum of \$2200.00 from said defendant Title Guarantee and Abstract Company as security for the payment of the remainder of said pretended purchase price of \$4400.00; that at said time the said defendant John F. Hall also sent, directed to said Dora Herrmann, the sum of \$1694.00, retaining and claiming the sum of \$506.00 from said alleged cash payment as his commission and attorney's fees for selling said property, drawing said pretended deed, and doing whatever legal work was incident to said pretended transfer, whereas in truth and in fact the said John F. Hall had assumed and pertended to sell said property to the said Title Guarantee and Abstract Company for the said Dora Herrmann and your orator, but concealed from your orator and said Dora Herrmann that the sale was for himself and the other defendants aforesaid for said grossly inadequate sum and value, and under an understanding and agreement between them and the said Title Guarantee and Abstract Company that he and said defendants were to acquire and retain said respective interests therein; that immediately on the execution of said pretended deed and the transmission of said several sums by the aforesaid de-

fendant, John F. Hall, and in pursuance of said plan and scheme and intent, said defendant Title Guarantee and Abstract Company made and issued its pretended trust certificates or memoranda as aforesaid to each and every of said defendants for his pretended interest in said property and trust as hereinbefore alleged to have been agreed upon by and between said defendants, including a certificate to said John F. Hall and James T. Hall for a two-twelfths interest thereof, said James T. Hall being a brother of said John F. Hall, and said defendants and each and every of them accepted said certificates so issued to him as evidence of his interest in said trust, and your orator, on information and belief, alleges the fact to be that each of said defendants is now the holder of said certificate so issued to him, and that each of them claims the interest in said property indicated and shown by such certificate held by him; that the defendant John F. Hall, with the knowledge and consent of the aforesaid defendants, who at all times knew the confidential relations existing between the said defendant John F. Hall and the said Dora Herrmann and your orator, and that he was their attorney in fact and legal and confidential adviser, failed and neglected to report to said Dora Herrmann or to your orator that he had sold the said property to said defendants, or that he or his brother, James T. Hall, had reserved and acquired, as aforesaid, an interest in said property, but fraudulently, wickedly, corruptly and

with intent to deceive, cheat and defraud the said Dora Herrmann and your orator, suppressed and concealed said facts and falsely represented that said property was of no greater value than \$4400.00, and that he had sold the same in good faith for that amount to the said Title Guarantee and Abstract Company."

The Complaint further charges (T., p. 15):

"XIa.

"Your orator further represents and alleges that on or about the 22d day of July, 1911, the defendant East Side Land Company, well knowing all the facts hereinbefore in this Bill of Complaint set forth, entered into an agreement with said defendant Title Guarantee and Abstract Company, trustee, of the particular nature of which your orator is not informed, and that in pursuance of said agreement and in compliance with the terms thereof said defendant Title Guarantee and Abstract Company, for itself and as trustee, wrongfully, fraudulently and corruptly, and with intent to cheat, wrong and defraud your orator of said property, attempted to transfer all of said lands hereinbefore described in this Bill of Complaint to said East Side Land Company, excepting such portions as said defendant Title Guarantee and Abstract Company, trustee, had theretofore attempted to convey or contracted to convey to other parties, and thereupon, and

in pursuance of said agreement, made, executed and delivered to said defendant, the East Side Land Company, a pretended deed of conveyance thereof, which deed was so made and executed on the 22d day of July, 1911, as to entitle the same to be recorded in the office of the County Clerk of said County of Coos on the 26th day of July, 1911, in Deed Book 60, page 349, of the Records of Deeds of Coos County, Oregon; that said defendant East Side Land Company accepted said pretended deed at said time and has ever since and now, wrongfully, and in violation, of the rights of your orator to the title and possession of said described property, claimed and still claims the ownership and holds possession thereof; that said defendant East Side Land Company has no right or title in said premises and said deed so made as aforesaid is void and a cloud upon the title of your orator in said premises; that the officers and all of the stockholders of said defendant East Side Land Company were cestui que trustent under and in the pretended trust attempted to be created under and in the pretended deed of conveyance of said property by the defendant John F. Hall, to the defendant Title Guarantee and Abstract Company, trustee, described in paragraph X of this Bill of Complaint, and said conveyance was without consideration to the Title Guarantee and Abstract Company, trustee, or any consideration except certain shares of its capital stock issued and delivered to the aforesaid cestui que trustent."

And the Complaint further charges that (T., p. 16) :

“XII.

“Your orator further represents and alleges that all of the defendants, during all of the times mentioned, resided in and now reside in the close vicinity of said described property, and were at all times intimately acquainted with one another, with said defendant John F. Hall, with said land and its value, and well knew that said sum of \$4400.00 was and is a grossly inadequate consideration and price for said land; that said land is located in close proximity to the growing city of Marshfield, Oregon, and abutts on the deep water of the harbor of Coos Bay, and said defendants and each of them well knew that said land was, at the time of said pretended sale reasonably worth the sum of \$150.00 per acre; that when said transfer had been so effected in the manner hereinbefore set forth, and immediately thereafter, the defendant Title Guarantee and Abstract Company, assuming to act as and claiming to be the trustee for the aforesaid defendants, and at the instance and request and by the direction of said defendants, caused a portion of said land to be platted into pretended lots and blocks for townsite purposes, and thereafter sold a large number of lots from the platted portion thereof for a large amount of money, but for what precise amount, and what was paid to and received by said trustee therefor, is unknown to your orator. * * * ”

And in connection with the same charge, the Complaint further alleges (T., p. 23):

“XVII.

“That from and since the said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has executed and delivered certain deeds, and has thereby pretended to convey and transfer to the defendants, Henry Sengstacken, Andrew Masters, Charles H. Curtis, Z. T. Siglin, Anna Johansen, S. C. Rogers, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines and Louise B. Haines, Harvey Smith, George Clinkinbeard, Anna D. Clinkinbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation; J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William J. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Fredericksen, Elizabeth Schieffele, Anthony Stambuck, George H. Elliott, Nellie Chandler, T. V. Johnson, Lisa Alto and J. T. Herrett, divers parts and parcels of the land hereinbefore set forth and described (meaning lots in the townsites last above mentioned), and said defendants now wrongfully claim and pretend to be the owners of the same, and have caused pretended deeds to be recorded in the deed records in the office of the County Clerk

of Coos County, Oregon, and claim to be the owners of the same; * * * ”

The Complaint further charges (T., p. 25):

“XVIII.

“That from and since said 30th day of August, 1905, the defendant Title Guarantee and Abstract Company has collected and received, since it has been in possession of said premises, from the rents, timber and profits thereof, divers sums of money, the amount of which your orator has not sufficient information or knowledge to form a belief from which to set forth and allege herein, but which your orator is informed and believes, and therefore alleges the fact to be, aggregates several thousand dollars, and a sum greatly in excess of the pretended purchase price of \$4400.00 aforesaid for which the defendant John F. Hall pretended to sell the said premises to the defendant Titl Guarantee and Abstract Company, trustee, for the defendants hereinbefore set forth; that on the — day of January, 1912, your orator requested and demanded of the defendant Title Guarantee and Abstract Company an accounting of all the rents, issues, timber and profits of said premises received by it since said 30th day of August, 1905; that on said day your orator also applied to said defendant and offered in writing to pay it the sum of \$4400.00 with interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, and requested it to execute and deliver a good and sufficient

deed to said premises to your orator; that the said defendant refused to account to your orator for said rents, timber, issues and profits, to accept said offer and tender of said sum of \$4400.00 and interest aforesaid, and refused to execute and deliver to your orator said deed to said premises."

"XIX.

"That during the month of January, 1912, your orator applied to and demanded of each and every of the defendants that could be located and found by your orator, that they execute and deliver to your orator a deed sufficient in form to release and quitclaim to your orator any and all claims, interest and estate they and each of them set up and claim to be the owners of in and to said premises by virtue of any deed or other instrument derainged from, by, through, or executed to them or either of them under the pretended deed aforesaid from the defendant John F. Hall to the defendant Title Guarantee and Abstract Company, but the said defendants and each of them refused to execute such deeds or any of such deeds and deliver the same to your orator; that your orator was unable to apply and make demand for conveyances of said property as herein alleged on defendants, Arthur B. Sandohl, Anna Johansen, Arne P. Husby, Mary A. Peterson, Doris L. Sengstacken, L. Grayce Gould, Cornelius Woodruff, A. R. Welch and J. T. Herrett, for the reason that your orator, after due diligence and search,

could not find nor locate said above named defendants within the State of Oregon or elsewhere for the purpose of making demand upon them."

And the Complaint prays, in substance, among other things, for cancellation of the deeds in question; that Christian Herrmann be declared to be the owner and entitled to the possession of the land in dispute; that the defendants be required to surrender possession thereof to complainant; that the claims of all the defendants thereto be declared to be wrongful and void; that the defendants John F. Hall, Henry Sengstacken, S. C. Rogers, J. J. Clinkinbeard, D. L. Rood, James T. Hall, William O. Christensen, Z. T. Siglin, Title Guarantee & Abstract Company, a corporation; East Side Land Company, a corporation, and East Marshfield Land Company, a corporation, be required to account to complainant for the rents, issues and profits of said premises, from August 31, 1905; for complainant's costs and disbursements, and for such other relief as the court might deem just and equitable. (T., p. 27-31.)

Thereafter, on June 25, 1912, Hall, Smith, Sengstacken, Siglin, Clinkinbeard, Rogers, Rood, James T. Hall, Christensen, together with their respective wives, and the Title Guarantee & Abstract Company and the East Side Land Company, filed their joint answer herein. (T., p. 49.)

ANSWER.

The Answer denies that Christian Herrmann, at the times mentioned in the Bill of Complaint, was a subject of the Emperor of Germany. (Answer, par. II, T., p. 50.) At the time of his complaint concerning his citizenship. (T., p. 115-116.) And defendants introduced no evidence to the contrary.

The Answer also denies that Mr. Herrmann is the sole heir of his deceased wife, Dora Herrmann. (T., p. 52. Answer, par. VIII.) Counsel for defendants admitted, however, at the trial that Mr. Herrmann was the sole heir of Dora Herrmann and entitled to any and all rights in and to the property in question herein that she would have owned had she been living. (T., p. 126.)

And in defense to the charges of the Complaint hereinbefore set forth, the Answer admits, denies and alleges, as follows (T., p. 53):

“X.

“Answering paragraph ‘IX’ thereof (Brief, page —), defendants deny each and every allegation therein contained.”

“XI.

“Answering paragraph ‘X’ thereof (Brief, p. —), defendants admit that John F. Hall as attorney in fact of said Dora Herrmann and this complainant, did on the 30th day of Aug-

ust, 1905, make, execute and deliver to the defendant Title Guarantee & Abstract Company, trustee, a certain deed of conveyance, a copy of which is attached to the Bill of Complaint herein marked 'Exhibit B' (T., p. 33), and defendants admit that said deed was recorded as alleged by complainant; and said defendants deny each and every other allegation therein contained except as may be hereinafter specifically stated, admitted or qualified."

The Answer continues (T., p. 54):

"XIII.

"Answering paragraph 'XIa' thereof (Brief, p. —), defendants admit that said Title Guarantee & Abstract Company, trustee, made, executed and delivered to defendant East Side Land Company a deed of conveyance on the 22d day of July, 1911, to the lands or portions of lands described in this Bill of Complaint, and that said deed was duly recorded; and said defendants deny each and every other allegation in said paragraph contained."

The Answer further admits and alleges (T., p. 54):

"XIV.

"Answering paragraph 'XII' thereof (Brief, p. —), defendants admit that they during all the times mentioned in said Complaint reside in the vicinity of said described property, and that they were acquainted with each other and

with the defendant John F. Hall and with said land and its value; and defendants admit that said land is located near the city of Marshfield, Oregon, and abuts on one of the inlets of Coos Bay, and that said Title Guarantee & Abstract Company caused a portion of said land to be platted into lots and blocks for townsite purposes, and thereafter sold certain of said lots for sums of money in terms as set forth in the account marked 'Exhibit A' (T., p. 72) attached hereto and made a part hereof; and these defendants deny that said defendant Title Guarantee and Abstract Company, or any other defendants herein, has ever received any further, other or different amount or amounts from the sale or use of said lands or any portion thereof than as shown by said 'Exhibit A'; that said account marked 'Exhibit A' shows the true state of the financial transactions since the date of conveyance of said lands of August 30th, 1905, and said account shows what part of the proceeds and avails from said lands were paid upon the purchase price thereof and what portions were disbursed for other purposes, and defendants deny that the facts with reference to the sale of lots or the disbursements of the proceeds thereof are any different or otherwise than as shown by said 'Exhibit A'; and said defendants do deny each and every other allegation in said paragraph contained."

And in connection with the same matter, the Answer further alleges (T., p. 57):

“XIX.

“Answering paragraph ‘XVII’ thereof (Brief, p. —), defendants do admit that the defendant Title Guarantee & Abstract Company has executed and delivered deeds to premises of said described property to persons named in said paragraph; and defendants deny each and every other allegation in said paragraph contained.”

The Answer further alleges (T., p. 57):

“XX.

“Answering paragraph ‘XVIII’ thereof (Brief, p. —), defendants admit that the defendant Title Guarantee & Abstract Company has collected and received up to the time of conveyance to defendant East Side Land Company from the rents, timber and profits of said described lands such a sum of money as is shown on ‘Exhibit A’ (T., p. 72) to have been received before said date of conveyance and transfer, and defendants deny that the Title Guarantee & Abstract Company or other defendant has received any further or different sums than as in said account set out; and defendants admit that this complainant requested and demanded an accounting of all the rents, issues, timber and profits from said described lands since the 30th day of August, 1905, and defendants allege that this complainant was then and there referred to said accounting, which is a copy of ‘Exhibit A,’ attached to the

Answer to the original Bill of Complaint herein, and which was then and there in this complainant's possession; and defendants admit that this complainant on the — day of January, 1912, tendered the defendant Title Guarantee & Abstract Company the sum of Forty-four Tundred Dollars (\$4400.00), with interest thereon at the rate of six per cent per annum from the 30th day of August, 1905, and then and there requested the execution and delivery of a deed of conveyance to said described lands to this complainant, and that the said defendant Title Guarantee & Abstract Company refused to accept said offer and tender of said sum and refused to execute and deliver to this complainant said deed so requested; and defendants deny each and every other allegation in said paragraph contained."

"XXI.

"Answering paragraph 'XIX' thereof (Brief, p. —), defendants admit each and every allegation therein contained."

And the Answer further admits, denies, alleges, explains and excuses, as follows (T., p. 59):

"XXV.

"And as a first, further and separate answer and defense to the complaint herein, defendants do allege:

“1. That on May 17, 1905, Dora Herrmann and this complainant, her husband, were living in the Empire of Germany; that the said Dora Herrmann then claimed to be the owner of the lands described in the complaint; that the said Dora Herrmann and the complainant, her husband, had theretofore appointed defendant John F. Hall as their attorney in fact under a duly executed power of attorney by virtue of which the said Hall was empowered to sell and convey in their behalf the lands described in the complaint.

“2. That the said Dora Herrmann was a woman with marked business capacity and had shrewdly managed her own business affairs since the death of her husband (Mr. Norman) in 1896; that the said Dora Herrmann, before removing to Germany in 1902, had lived in close proximity to the lands described in the complaint for upwards of twenty-five years and knew all about the location and topography of the lands described, the then value thereof, and the possibilities of enhancement; that after removing to Germany and up to the time of her death on September 18, 1905, the said Dora Herrmann solely managed her affairs in Coos County and kept herself advised by correspondence and subscribed to Marshfield, Oregon, newspapers, of the progress and development of the community; that the said Dora Herrmann was very anxious to dispose of her Coos County property and repeatedly scolded her attorney in

fact because he was not able to make earlier sales, and especially urged her said attorney in fact to sell the lands described in the complaint; that there was no marked change in the local conditions of Marshfield from the time of the removal of said Dora Herrmann to Germany to the time of the conveyance of said property, which would tend to enhance the value of said property.

“3. That said Dora Herrmann being fully advised as to the value of her property, did in April and June, 1905, specifically authorize and direct her said attorney in fact to sell the said described lands for the price of \$4000.00.

“4. That on May 17, 1905, the said defendant John F. Hall, as attorney in fact for said Dora Herrmann and this complainant, did sell said lands to defendants Henry Sengstacken and L. D. Smith for the price of \$4400.00—\$2200.00 cash and \$2200.00 due in one year at 6 per cent interest per annum, secured by purchase price mortgage; that said purchasers then and there paid down to said Hall the sum of \$100.00 in the form of an unconditional promissory note due in ten days, signed by both purchasers; that the balance of said cash, \$2100.00, was agreed to be paid when said Hall should furnish a satisfactory abstract of title; that said Hall then ordered an abstract and the title was accepted by defendants Smith and Sengstacken in the latter part of August, 1905.

“5. That said price of \$4400.00 was the then reasonable market value of said property and was the highest and best price obtainable by said Hall; that said lands were never reasonably worth any greater sum than \$4400.00 at any time during the interval from May 17, 1905, to August 31, 1905.

“6. That in August, 1905, the said Sengstacken and Smith decided to form a syndicate to take over their purchase of said lands; and the said Sengstacken and Smith did interest with them defendants, S. C. Rogers, J. J. Clinkinbeard, D. L. Rood and one Herbert Rogers who is not named as a defendant herein; that the said Sengstacken and Smith agreed with said persons to form a syndicate to take over the purchase of said lands, and each of said persons agreed to pay in on the purchase price in proportion as follows:

“Henry Sengstacken, three-twelfths;

“L. D. Smith, three-twelfths;

“J. J. Clinkinbeard, two-twelfths;

“S. C. Rogers, two-twelfths;

“D. L. Rood, one-twelfth;

“Herbert Rogers, one-twelfth;

and it was agreed and understood that said syndicate should take over the purchase of said lands by Sengstacken and Smith and that each should have an interest in said property ac-

cording to the proportion of his payment as agreed aforesaid; and it was further agreed and understood by the several members of said syndicate that title to said property should be taken in trust for their benefit in the name of the Title Guarantee & Abstract Company, a corporation, trustee.

“7. That upon acceptance of said title by said Sengstacken and Smith in the latter part of August, 1905, it was then and there agreed by and between said Sengstacken and Smith on their own behalf and on behalf of said syndicate, and said John F. Hall, attorney in fact, that said deed should be made and executed ready for delivery on August 30, 1905, and should run to Title Guarantee & Abstract Company, a corporation, trustee, as grantee, and that on said 30th day of August, 1905, the first payment of said purchase price of \$2200.00 should be fully paid by said syndicate and a purchase price mortgage securing the balance of \$2200.00, should also on August 30, 1905, be executed by said grantee and delivered to said attorney in fact.

“8. That in the forenoon of August, 30, 1905, pursuant to said understanding and agreement said S. C. Rogers and J. J. Clinkinbeard went to the office of said Hall and paid to said Hall their proportionate shares of said \$2200.00, and then and there said Hall read to them said deed of said property, which was then

and there by them approved and accepted; that during said day L. D. Smith and D. L. Rood paid in their proportionate shares of said purchase price to defendant Henry Sengstacken; that after said payment into Sengstacken and Hall as aforesaid the said Herbert Rogers refused to make payment of his proportionate interest; that said Sengstacken on the afternoon of said day paid over to said Hall the proportionate interest of himself, Smith and Rood, and then and there, without the knowledge of any other member of said syndicate, stated to said Hall that said Herbert Rogers had refused to take up his one-twelfth interest, and then and there suggested and asked said Hall to take the interest of said Herbert Rogers in lieu of commissions; that said Hall refused to take said interest alone, but agreed with his brother and partner, J. T. Hall, to take said interest in the name of Hall & Hall; that the deed and mortgage were then on the following day acknowledged and delivered and defendant John F. Hall on August 31, 1905, sent a statement of account to said Dora Herrmann, remitting to her the balance of said purchase price in his hands after deducting his agreed commissions and other expenses incidental to her other properties.

“10. That said defendant John F. Hall never had any idea of participating in any manner in said purchase until the said Sengstacken requested him to take the interest of Herbert

Rogers in lieu of commissions as alleged afore-said; that said defendant John F. Hall sold said land for the best price obtainable and in every way to the advantage of Dora Herrmann and this complainant, and in the selling of said land, in no way acted for himself or in his own interest; that said sale was made and consummated before the said John F. Hall thought of taking, or agreed to take, any interest therein.

“11. That the interest of each and all the members of said purchasing syndicate has passed by assignment and conveyance to defendant East Side Land Company, a corporation, subject to certain lot sales alleged in the Bill of Complaint; and the said East Side Land Company is now the owner of the lands described in the complaint, free from any and all equities of this complainant.

The Answer further alleges (T., p. 64) :

“XXVI.

“And as a second, further and separate defense to said complaint, defendants do allege :

“1. That said Dora Herrmann or this complainant on May 17, 1905, or at any time subsequent thereto, never owned the lands described in the complaint or any part thereof and had no right to make a sale or conveyance thereof; but that said title was then in other persons and the same has since been acquired by mesne

conveyance by defendant East Side Land Company, a corporation.”

At the time of trial in the court below, however, counsel for defendants expressly repudiated and abandoned this defense. (T., p. 88.)

The Answer further confesses and excuses as follows (T., p. 65):

“XXVII.

“And as a third, further and separate defense to said complaint, defendants do allege:

“1. That said defendants, Henry Sengstacken and L. D. Smith, on May 17, 1905, purchased said described lands from Dora Herrmann and this complainant by and through their said attorney in fact, John F. Hall; that in such purchase and sale there was no collusion, confederation or conspiracy whatsoever between said purchasers and said Hall in fraud of the rights of said Dora Herrmann or this complainant or otherwise; that said purchase was made by said Sengstacken and Smith without any expectation on their part that said Hall was thereafter to acquire any interest in said property; that said sale and purchase was in no way tainted with fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter in taking over the title to said property, through no collusion, confederation or conspiracy of said Seng-

stacken, Smith and Hall, the said Hall acquired a one twenty-fourth interest therein, and in the acquisition of said interest the said Hall acted in good faith, believing that he was lawfully entitled to take said interest; that thereafter neither these defendants, Sengstacken and Smith, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection with said sale and passing of title, but said defendants, Sengstacken and Smith, believed and presumed that the said Dora Herrmann and this complainant knew all the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then and there ratified by said Dora Herrmann and this complainant.

“2. And likewise, when said syndicate was formed by defendants, Sengstacken, Smith, Rogers, Clinkinbeard, Rood and Herbert Rogers to take over the purchase of said Sengstacken and Smith, there was no collusion, confederacy or conspiracy between them and the said John F. Hall in fraud of the rights or interests of said Dora Herrmann or this complainant, or otherwise; nor did said members of said syndicate nor said Hall expect, believe or suspect that said Hall was thereafter to acquire any interest whatsoever in said property; that the agreement of said syndicate with said Hall to take over the said purchase of Smith and Sengstacken was in no way tainted with

fraud, and the said Dora Herrmann received the reasonable market value of said property; that thereafter, in taking over the title of said property, the said Herbert Rogers refused to contribute his proportion of the purchase price as he had theretofore agreed, and the said John F. Hall agreed with his brother to take the interest of said Herbert Rogers in lieu of their commissions; that thereby, after all the other members of said syndicate had paid in their proportionate shares, the said John F. Hall acquired a one twenty-fourth interest in said property; that the said interest was acquired by said John F. Hall honestly and in good faith, he believing at that time that he had a right to acquire said interest; that said interest was taken by said John F. Hall without any knowledge thereof on the part of any of the members of said syndicate except said Henry Sengstacken and James T. Hall; that thereafter none of the members of said syndicate, nor said Hall, ever intentionally concealed from the said Dora Herrmann or this complainant any of the facts in connection with the said sale or passing of title, but the members of said syndicate have each believed and presumed that the said Dora Herrmann and this complainant knew all of the facts in connection with said sale at the time thereof or immediately thereafter, and that the said sale and transfer was then ratified by said Dora Herrmann and this complainant.

“3. That the said interests of said Hall & Hall, and S. C. Rogers, for value received, were thereafter acquired by said Sengstacken.

“4. That the said interest of said J. J. Clinkinbeard, for value received, was thereafter acquired by said Smith.

“5. That the said interest of D. L. Rood was thereafter, for a valuable consideration, acquired by defendant Z. T. Siglin without any knowledge whatever of any of the facts or circumstances in the matter of the acquisition of the Hall & Hall interest as heretofore alleged.

“6. That said Sengstacken, Smith and Siglin, being the owners of all of the equitable interests in said property, organized the East Side Land Company as a holding corporation and caused the legal and equitable title in said property to be conveyed to said East Side Land Company; and in consideration of such conveyance, each received an amount of the capital stock of said East Side Land Company in proportion to their respective interests.

“7. That the said East Side Land Company is now the owner of said lands described in the complaint herein, except for the sale of a few lots to individual purchasers, and this complainant is neither at law or in equity entitled to any interest therein, and has no just claim to any part thereof.”

Thereafter, on the 2d of July, 1912, Christian Herrmann filed his Reply to the Answer. (T., p. 75.)

REPLY.

The Reply denies generally each and every allegation contained in the Answer, save and except only such as admit the allegations of the Bill of Complaint.

After the time he filed his Bill of Complaint, Mr. Herrmann satisfied himself that the various persons to whom the Title Guarantee & Abstract Company, trustee, and the East Side Land Company had sold lots in the townsites of East Side and Home Addition to East Side, who were made defendants in the complaint, were innocent of any knowledge of the way in which their grantors had obtained title thereto. And complainant, therefore, asked for no relief against such defendants.

Complainant also adjusted his differences with the defendant, East Marshfield Land Company, before the date of trial, and, therefore, asked for no relief against it.

Thereafter, on the 3d of February, 1913, the Honorable District Court, having heard the evidence, etc., rendered the following Opinion (T., p. 80):

OPINION.

The court, after deciding that "there is nothing in the record to support the charge of actual fraud made in the bill" (T., p. 80), held as follows (T., p. 82):

" * * * Hall was and had been, for several years prior to the sale, the agent and attorney in fact of Mrs. Herrmann, who formerly resided on Coos Bay, but emigrated to Germany in 1900 or 1901, where she continued to reside up to the time of her death, September 18, 1905.

"Mrs. Herrmann, as evidenced from her correspondence, was a woman of more than ordinary business capacity, thoroughly familiar with her property, and Hall, in transacting business for her and especially in the sale of her property, followed her instructions rather than his own initiative. For some time prior to May, 1905, she had repeatedly written him, urging and authorizing him to sell the property in controversy for four thousand dollars. Hall made repeated and diligent efforts to do so but was unable to effect a sale until May 17, 1905, when he contracted to sell the same to defendants, Sengstacken and Smith, for \$4400.00, half in cash and the balance on time, secured by mortgage. Sengstacken and Smith gave him at the time their joint note for one hundred dollars as part payment on the purchase price, for which he gave them a receipt specifying that

it was to apply on the purchase price of the property now in controversy. The transaction was to be completed and the title papers passed when the abstract could be prepared and the title approved.

“At the instance of Sengstacken and Smith, S. C. Rogers and J. J. Clinkinbeard agreed to each take a two-twelfths interest in the property, and D. L. Rood and Herbert Rogers each a one-twelfth interest, leaving six-twelfths to be divided equally between Sengstacken and Smith, it being agreed between the intending purchasers that, as a matter of convenience the land should be deeded to the Title Guarantee & Abstract Company in trust for the owners.

“On August 30, 1905, the day the sale was to have been consummated and the papers exchanged, Clinkinbeard and S. C. Rogers paid to Hall direct their two-twelfths each of the first payment; Rood and Smith paid their one-twelfth and three-twelfths respectively to Sengstacken to be paid to Hall. Herbert Rogers, however, declined to proceed with the purchase and take a one-twelfth interest in the property, for the reason that he did not deem it a good investment. After Clinkinbeard and S. C. Rogers had paid their proportion to Hall and when Sengstacken went to Hall's office to pay the balance of the first payment, he informed Hall of Herbert Roger's refusal to take one-twelfth of the property and suggested to Hall that he take such interest as a part of his commission

for making the sale. Hall declined to do so without first consulting his partner who had an interest in the commission, whereupon Sengstacken paid Hall the balance due, except for the one-twelfth interest, and Hall credited Mrs. Herrmann with the entire amount due, agreeing to look to Sengstacken personally for the deficit, in case he and his partner should conclude not to take the interest offered. At that time the deed had been prepared and signed but not acknowledged. After consulting with his partner and on the following day, Hall informed Sengstacken that they would take the Herbert Roger's one-twelfth interest, and the deed was thereupon acknowledged and delivered. None of the purchasers except Sengstacken had any knowledge of this transaction with Hall until some time after the matter had been completed and deed to the abstract company delivered.

“That Hall acted in the utmost good faith and with no intention of injuring or cheating his principal is manifest from the testimony. He had been repeatedly implored by her to make the sale, as she represented she was badly in need of money, and he was consequently anxious that it should not fall through. He was in no way interested with Sengstacken and Smith in the original contract for the purchase, and had no idea or thought of taking a part of the property until it was suggested to him by Sengstacken on the day the matter was consum-

mated and after S. C. Rogers and Clinkinbeard had made their payments and the deed of conveyance had been prepared and signed.

“Under these circumstances it is clear to my mind that Hall’s purchase could not in any way affect the title of the other parties. All of them except Sengstacken were ignorant of the matter until some days after the same had been consummated. They were in no way responsible for nor parties to Hall’s purchase, and could not be affected thereby.

“Nor do I think the purchase by Hall is constructively fraudulent or voidable as to him. It is, of course, settled law that an agent authorized to sell property cannot himself become the purchaser without the consent of his principal, and if he does so the transaction is void as it respects the principal unless ratified by him with full knowledge of all the circumstances. The reason of this rule is that the law will not permit an agent to place himself in a situation in which there is a conflict between duty to his principal and his own personal interest, and therefore the fact that in a given case the agent’s motives were honorable, and that the result was beneficial to the principal will make no difference if the latter chooses to repudiate the transaction. (Mechem on Agency, Sec. 445-461; Robertson vs. Chapman, 152 U. S. 673.) But the reason of the rule does not apply in this case. Here the sale was virtually made by Hall to Sengstacken in May, 1905. At that time it is

admitted he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time his contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard. His subsequent taking title to an undivided one twenty-fourth was, to all intents and purposes, a purchase from Sengstacken and Smith or Herbert Rogers, and not from himself as agent of Mrs. Herrmann. The fact that the deed had not been formally acknowledged and delivered at the time cannot change the effect of the transaction, or, in my judgment, bring it within the rule prohibiting an agent from buying from himself, nor the evil to be prevented thereby.

“It follows that the bill should be dismissed and it is so ordered.”

SPECIFICATION OF ERRORS.

I.

The court erred in refusing to grant complainant's prayer for the recovery of the land in controversy.

II.

The court erred in holding that Hall contracted to sell the land to Sengstacken and Smith, on May

17, 1905; that Hall's duty to his principals thereupon ceased, and that he was at liberty thereafter, and before the deed conveying the property to the Title Guarantee & Abstract Company, trustee, was executed and delivered, to speculate with the subject matter of his agency.

III.

The court erred in holding that none of the other members of the purchasing syndicate, except Sengstacken, knew of the understanding between Sengstacken and Hall, whereby it was agreed that Hall should have a share in the syndicate and a joint undivided interest in the land, until after the time of the execution and delivery of the deed to the Title Guarantee & Abstract Company, trustee for said syndicate, on August 31, 1905, and that, therefore, "they should not be affected thereby."

POINTS AND AUTHORITIES.

I.

1. If an agent for the purpose of selling property of his principal purchases it himself, either directly or through the instrumentality of a third person, without the knowledge and consent of the principal, the sale is voidable; it will always be set aside at the option of the principal; and the amount of consideration, the absence of undue advantage, and other similar features, are wholly immaterial. Noth-

ing will defeat the principal's right of remedy, except his own confirmation after full knowledge of all the facts.

Mechem on Agency, Sec. 454, 455, 461.

Michoud vs. Girod, 4 How. (U. S.) 503.

Gardner vs. Ogden, 22 N. Y. 327.

Wormley vs. Webb, 44 Mo. 444, 450.

Mills vs. Goodsell, 5 Conn. 475.

Bain vs. Brown, 56 N. Y. 288.

The fact that the agent purchased at the price he was authorized to sell will not make the transaction valid.

Tillney vs. Wolverton, 46 Minn. 256.

Porter vs. Woodruff, 36 N. J. Eq. 174.

And where the agent purchases his principal's property jointly with another, the transaction is likewise invalid, both as to the agent and his co-purchaser. Equity will not permit another to profit through the violation of a fiduciary relation any more than it will permit the agent himself to do so.

Reeves vs. Calloway, et al., 78 S. E. (Ga.) 717.

Smith vs. Seattle, etc., R. R. Co., 72 Hun. (N. Y.) 202; 25 N. Y. Supp. 368.

O'Meara vs. Lawrence, 141 N. W. (Ia.) 312.

Hoffman Coal Co. vs. Cumberland Coal Co., 16 Md. 456.

O'Dell vs. Rogers, et al., 44 Wis. 136.

Mitchem vs. Mitchem, 3 Dana (Ky.) 266.

Finch vs. Conarde's Exr., 154 Pa. St. 326.

Miller vs. Ry Co., 83 Ala. 274; 3 Am. St. Rep. 722.

Norris vs. Tayloe, 49 Ill. 18.

And where the agent sells his principals property to an association or partnership, of which he is a member, the sale is likewise invalid, not only as to the agent himself, but as to all his associates as well.

Robbins vs. Butler, 24 Ill. 387, 432.

Bedford Coal Co. vs. Parke Co. Coal Co., 89 N. E. 412.

Curry vs. King, 92 Pac. (Cal.) 662.

Frye vs. Platt, 32 Kan. 62.

People vs. Township, 11 Mich. 222, 228.

2. And a subsequent purchaser from the agent or his co-purchasers, with notice of their unlawful transaction, stands in no better position than they occupied, and holds as trustee for the principal.

Hoffman Coal Co. vs. Cumberland Coal Co., 16 Md. 456.

Cumberland Coal Co. vs. Sherman, et al., 30 Barb. (N. Y.) 553.

Bank vs. Gray, 84 Ky. 565.

II.

1. Any agreement for the sale of real property, or any interest therein, is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the

party to be charged or by his lawfully authorized agent. No evidence of such agreement is admissible other than the writing, or secondary evidence of its contents.

Lord's Oregon Laws, Secs. 804, 808.

Lord's Oregon Laws, Sec. 804, provides that:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

Lord's Oregon Laws, Sec. 808, provides that:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:

* * *

"6. Any agreement for the leasing, for a longer period than one year, or for the sale of

real property, or any interest therein."

* * *

The note or memorandum "must show who are the contracting parties, intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement."

Catterlin vs. Bush, 39 Or. 496.

Frye vs. Platt, 32 Kan. 62; 3 Pac. 781.

Williams vs. Morris, 95 U. S. 444, 456.

Ross vs. Allen, 45 Kan. 231; 25 Pac. 570.

Sheid vs. Stamps, 34 Tenn. 172.

Lippincott vs. Bridgewater, 55 N. J. Eq. 208.

And "no less evidence of the contents of such written instrument, when the original is lost, will satisfy the demands of the law. The terms of the contract cannot be inferred, they must be affirmatively proven." The contract "must be proven specifically, and not in general terms."

McCarthy vs. Kyle, 4 Coldwell's Rep. (Tenn.) 348.

Tayloe vs. Riggs, 1 Pet. (U. S.) 591.

Edwards vs. Noyes, 65 N. Y. 125.

Nicholson vs. Tarpey, 89 Cal. 617.

Rankin vs. Crow, 19 Ill. 626.

Hooper vs. Chism, 13 Ark. 496.

The parol evidence, to be admissible, should purport to give the "language" of the alleged lost instrument, and "testimony as to the propositions

made and accepted therein, as construed by the witness," is incompetent.

Elwell vs. Walker, 52 Iowa 256, 262-263.

Scurry vs. City of Seattle, 56 Wash. 1.

Carpell vs. Fagan, 30 Mont. 507; 77 Pac. 55.

Before secondary evidence is admissible to show the contents of a lost paper, however, it must appear, first, that the writing is lost and cannot be found by diligent search; and, second, it must be proved that the instrument was executed or subscribed with all the formalities required by law.

Shrowders vs. Harper, 1 Har. (Del.) 444.

As to loss:

Blondeau vs. Sheridan, 81 Mo. 545, 556.

Folsom's Exr. vs. Scott, et al., 6 Cal. 460.

Bascom vs. Turner, 5 Ind. App. 229, 236.

Holbrook vs. School Dist., 28 Ill. 187.

As to execution:

Holman vs. Borchers, 24 Mo. App. 629, 636.

Edwards vs. Noyes, 65 N. Y. 125.

Helton vs. Asher, 103 Ky. 730, 733-734.

Moor vs. Cary, 42 Me. 29.

Porter vs. Wilson, 13 Pa. St. 641, 645.

Smith vs. Smith, 106 Ga. 303, 306-307.

2. Where an agent has been employed to sell and convey property, his duty to his principal does not terminate when he has entered into a mere contract to sell. The agent's duty does not cease until

the contract has been executed and title to the property passed.

Wing & Evans vs. Hartupee, 122 Fed. 897.

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. 96.

III.

1. Notice of any fact affecting a transaction to one of two purchasers, who acts for his associate as well as for himself in negotiating or consummating a purchase, is notice to the associate.

McLean vs. Clark, et al., 47 Ga. 24, 69.

Smith vs. Adams, 4 Tex. Civ. App. 5.

Atterbury vs. Hopkins, 122 Mo. App. 172.

Richards, et al. vs. Sutter, 125 S. W. (Ark.) 1018.

Stanley vs. Green, 12 Cal. 149.

“The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of a contract made by another for him, whether by appointment or by a self constituted agent, is bound by the representations made and the methods employed by the agent to effect the contract.”

Wilson vs. McCarthy, 134 Pac. (Or.) 1189.

Presby. vs. Parker, 56 N. H. 409.

Darner vs. Brown, 137 N. W. 461.

Harrell vs. Brooks, 113 S. W. 961.

Krum vs. Bench, 96 N. Y. 398.

Morse vs. Ryan, 26 Wis. 356.

2. Notice of any fact affecting title of property to a trustee thereof is notice to the cestui que trust.

Meyers vs. Ross, 40 Tenn. 59.

Pope vs. Pope, 40 Miss. 516.

Houston Oil Co. vs. Hayden, 135 S. W. (Tex.) 1149.

Schofield vs. Cogdell, 113 S. W. (Tenn.) 375.

3. Where the owner is illegally deprived of his property, he is at liberty to follow it into the hands of any subsequent grantee, until it reaches the hands of a bona fide purchaser for a valuable consideration, without notice of his rights.

Oliver vs. Piatt, 3 How. (U. S.) 401.

And where the title, after a transfer even to an innocent purchaser revests in the original fraudulent grantee, the equitable rights of the original owner re-attach to it in his hands.

O'Dell vs. Rogers, 44 Wis. 136, 180.

Bourquin vs. Bourquin, 120 Ga. 115, 117-119.

Trentman vs. Eldridge, 98 Ind. 525.

Johnson vs. Gibson, 116 Ill. 294.

Talbert vs. Singleton, 42 Cal. 390.

Church vs. Church, 25 Pa. St. 278.

Bank vs. Wilcox, 24 Wis. 671.

II Pomeroy's Eq. Jur., Sec. 754.

I Story's Eq. Jur. (13 Ed.), Sec. 410.

BRIEF OF ARGUMENT.

The right of the complainant to the relief prayed for in this suit is based upon the fact that Hall, while acting as agent for complainant and his wife for the sale and conveyance of the land in question, under a general power of attorney, sold and transferred it to the Title Guarantee & Abstract Company, trustee, under an express understanding and agreement that said company was to receive and hold the legal title of said property in trust for the joint benefit of Hall himself and his associates in the deal, Sengstacken, Smith, Rogers, Rood and Clinkinbeard, without the knowledge or consent of his principals.

Hall's interest in the transaction is not denied. In fact, defendants themselves expressly admit that he and Sengstacken, who was acting on behalf of the purchasing syndicate, entered into an understanding whereby it was agreed that he was to have a joint, undivided interest in the land with the other members of the syndicate, before he executed and delivered the deed thereof to the Title Guarantee & Abstract Company, trustee.

Notwithstanding these facts, however, defendants contended, and the trial court held, that complainant was not entitled to the relief prayed for, because Hall had agreed to sell the land to Sengstacken and Smith, on May 17, 1905, before he had the understanding with Sengstacken whereby he

was to share in the purchase; that Hall's duty to his principals ceased when he entered into the agreement to sell the land to Sengstacken and Smith, on May 17, and that he was at liberty thereafter to speculate with the subject matter of his agency.

And the defendants further contended, and the court held, that all the other members of the purchasing syndicate, except Sengstacken, were ignorant of the understanding entered into by and between Hall and Sengstacken, whereby Hall was to have an interest in the land which he was conveying, until after the deed thereof to the Title Guarantee & Abstract Company, trustee, had been executed and delivered, and that, therefore, they "should not be affected thereby."

We respectfully urge that the trial court erred in refusing to grant the relief prayed for by the complainant, and in sustaining defendants' contentions, for the following reasons:

I.

The Court Erred in Refusing to Grant Complainant's Prayer for the Recovery of the Land in Controversy.

1. *Hall sold the land to a syndicate of which he himself was a member.*

The facts upon which complainant founds his right of recovery in this suit are expressly admitted by defendants. It is admitted that Hall was

agent for Mr. and Mrs. Herrmann. (Answer, T., p. 59.) It is admitted that Hall was a member of the syndicate to which he sold and conveyed his principals' property at the time he executed and delivered the deed thereof to the Title Guarantee and Abstract Company, trustee for said syndicate, on August 31, 1905. (Answer, T., p. 61-64. Sengstacken's testimony, T., p. 331-332.) And the evidence shows, and it is admitted, that Mr. and Mrs. Hermann were never informed as to whom Hall had sold and conveyed their property. (Hermann's testimony, T., p. 142-144. Hall's testimony, T., p. 249-255.)

Under these circumstances, it was not necessary for complainant to show that Hall and his co-purchasers committed *actual* fraud in acquiring the land in order to set the transaction aside. The law is well settled that an agent cannot purchase his principal's property, without the latter's knowledge and consent. And it is not necessary, in order for the principal to set such a transaction aside, to show that *actual* fraud has been perpetrated in the consummation of the sale, or that he has been damaged in any way, or that the price paid was inadequate, or that the transaction was unfair in any particular. The law gives the principal the absolute right to repudiate such a transaction at his mere option.

The court states the rule and its reasons very clearly in *Porter vs. Woodruff*, 36 N. J. Eq. 174, in the following language:

“ * * * The general interests of justice and the safety of those who are compelled to repose confidence in others alike demands that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase can he himself be the seller. The moment he ceases to be the representative of his employer and places himself in a position toward his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his services requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as

more important and entitled to more protection than his own.

“In such cases the courts do not stop to enquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a

dual character is made broad enough to cover all transactions. * * *

In *Michoud vs. Girod*, 4 How. (U. S.) 555, the court said:

“ * * * The inquiry, in such a case, is not whether there was or was not *fraud in fact*. The purchase is void, and will be set aside at the instance of the cestui que trust, and a re-sale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. * * * *Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?*”

In *Wormley vs. Webb*, 44 Mo. 444, the court said:

“ * * * Nothing is better settled than that an agent or trustee, or person acting in a fiduciary capacity, cannot speculate for his private gain with the subject matter committed to his care, to the prejudice of his principal. He cannot be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud,

*and affords opportunities to persons, who should always act with the utmost conscientious and scrupulous good faith, to abuse their trust; and therefore a total disability is enjoined, to take away all temptation. * * **

In *Mills vs. Goodsell*, 5 Conn. 475, the court said:

*“ * * * It is idle to inquire into the fairness or unfairness of transactions of this character; whether the sale, under all circumstances, was or was not the best that could have been made. * * * It is in vain to urge that he gave more than any one else would. * * * The law cuts up, root and branch, the power to purchase, and the temptation to defraud. It will not permit an inquiry into the fairness or unfairness of the transaction.”*

In *People vs. Overysse*, 11 Mich. 228, Judge Manning said:

*“ * * * If such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party.”*

Mr. Mechem states the rule in the following language:

“ * * * The agent will not be permitted to serve two masters, without the intelligent consent of both. As is said by a learned judge: ‘So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction, so as to buy of himself, as agent, the property of his principal, unless ratified by him with full knowledge of all the circumstances. *To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interests to disregard that of his principal.*’ ‘This doctrine,’ to speak again in the beautiful language of another, ‘has its foundation, not so much in the commission of actual fraud, as in that profound knowledge of the human heart which dictated that hallowed petition (‘Lead us not into temptation but deliver us from evil’), and that caused the announcement of the infallible truth that ‘a man cannot serve two masters.’ ”

Mechem on Agency, Sec. 455.

“ * * * The law looks at the natural and legitimate tendencies of such transactions, and not at the motive of the agent in a given case. This tendency is *demoralizing*, and the fact

that in a certain case the agent's motive was honorable, or that the result is more beneficial to the principal, will make no difference if the latter chooses to repudiate it. Said a learned judge: 'If such contracts were to be held valid, until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact, unless affirmed by the opposite party. This rule appears to me so manifestly in accordance with sound public policy as to require no authority for its support.' "

Mechem on Agency, Sec. 461.

In *Bain vs. Brown*, 56 N. Y. 288, the court said:

" * * * *When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.* * * * "

And the rule is the same where the agent purchases his principal's property jointly with another—the rule affects both the agent and his co-purchaser alike.

Thus, in *Reeves vs. Calloway*, 78 S. E. (Ga.) 717, the plaintiff had employed defendant, Etheridge, an attorney, to advise and represent him in the sale of his land. A sale was made to defendant, Calloway. Afterwards, it developed that Etheridge was interested with Calloway in the purchase. The court said:

“The Code declares that, without the express consent of the principal, after a full knowledge of all the facts, an agent employed to sell cannot be himself the purchaser. * * * *This principle applies as well to a case where the agent joins with a stranger, who has knowledge of the agency, in making the purchase as where the agent is sole purchaser.* In such case the proportion of the purchase money paid by the purchasers is an irrelevant fact. It is immaterial whether the agent’s partner in the transaction furnished all or a part of the money, if he knows of the agency and joins with the agent in the purchase of the property on joint account, or for their mutual benefit. The policy of the law forbids an agent employed to sell to place himself in an attitude of antagonism to the interest of his principal by associating himself with another in the purchase of land, and *a sale by an agent without the express consent of his principal to himself in association with another, with knowledge of his agency, will be set aside at the instance of the principal.* The law does not inquire in such a case whether there was any fraud, but gives

the principal the absolute right to repudiate the transaction, because it will not allow an agent to take a position which is inconsistent with his duty to his principal."

The same rule is stated in *Smith, et al. vs. Seattle, etc., R. R. Co.*, 72 Hun. (N. Y.) 202; 25 N. Y. Supp. 368, in the following language:

"When an agent is employed to sell, he cannot lawfully become the purchaser. * * * *When he violates these rules he commits a fraud on his principal, and whoever gives an agent an interest in a contract which he is authorized to make, becomes guilty of participating in the fraud of the agent, and a contract so entered into is voidable at the election of the principal.* * * * "

See also:

Hoffman Coal Co. vs. Cumberland Coal Co.,
16 Md. 456.

O'Dell vs. Rogers, 44 Wis. 136.

O'Meara vs. Lawrence, 141 N. W. (Ia.) 312.

Mitchem vs. Mitchem, 4 Dana (Ky.) 266.

Miller vs. R. R. Co., 83 Ala. 274.

Norris vs. Tayloe, 49 Ill. 18.

And where the agent sells his principal's property to an association or partnership, of which the agent is a member, the transaction is likewise void at the principal's option.

The case of *Robbins vs. Butler*, 24 Ill. 387, presents a set of facts somewhat similar to the facts in the case at bar. In that case, William B. Ogden, agent for Allen Robbins, contracted with John Bradley and A. Hyatt Smith to sell his principal's land to the Chicago Land Company, an association, of which said agent was himself a member. The court said (p. 427):

“Is the contract, made with Bradley and Smith, date 10th of November, 1852, binding on appellant?

* * *

“The parties to the agreement to sell are William B. Ogden (agent) of the first part, and John Bradley and A. Hyatt Smith of the second part, but who are really contracting for the Chicago Land Company, of which W. B. Ogden was a member. The contract recites the agreement of May 31, 18—, under which Ogden's claim to act for Robbins arises.

* * *

“From the fact that W. B. Ogden was a member of the Chicago Land Company, in its inception under another name, as early as May, 1852; that about the time the associates forming this company commenced the purchase of lands with a view of their rise in value; that Bradley and Smith were members of this company, and so known to their associate, Ogden; that he in selling to them was, really, selling to

himself, or to an association of which he was a member; the sale was void, on the well known principle that a trustee cannot be purchaser, directly or indirectly, of the property or estate entrusted to him to sell. * * * Ogden himself was a purchaser as well as vendor. He was a member of the land company to whom he sold the land. *And all his associates are chargeable with the same considerations that would bear upon him were he solely interested as purchaser.* * * * ”

See also:

Bedford Coal Co. vs. Parke Co. Coal Co., 89 N. E. (Ind.) 412.

Frye vs. Platt, 32 Kan. 62.

Curry vs. King, 92 Pac. (Cal.) 662.

Applying these rules to the admitted facts in the case at bar, there can be but one conclusion. The conveyance by Hall to the Title Guarantee & Abstract Company, in trust for the benefit of himself and his associates, should be set aside.

2. *The East Side Land Company is not an innocent purchaser.*

The fact that the Title Guarantee & Abstract Company, trustee, and the members of the syndicate, assigned and transferred the land to the East Side Land Company, which company now claims to own it, does not preclude complainant from his right of relief. It was not claimed by defendants that the

East Side Land Company was an innocent purchaser. And the evidence shows that it was not. Sengstacken, Smith and Siglin organized the East Side Land Company for the sole purpose of receiving and holding the legal title of the land for themselves. (T., p. 312.) It appears that after Sengstacken, Smith and Siglin acquired the equitable interests of all the other members of the purchasing syndicate, they caused the Title Guarantee & Abstract Company, trustee, to convey the legal title of the land to the East Side Land Company. (Answer, T., p. 68.) Sengstacken, Smith and Siglin organized and incorporated the latter company; all the stock thereof was issued to them, and is now owned by them, in the following proportions, to-wit: Sengstacken, six-twelfths thereof; Smith, five-twelfths thereof, and Siglin, one-twelfth thereof. (T., p. 312.) And Sengstacken was made president, and the other offices were filled by the other two members. In the language of the court, in *Cumberland Coal Co. vs. Sherman, et al.*, 30 Barb. (N. Y.) 553:

“ * * * They were its creators; they breathed into it life, and gave it all it had, and owned the whole of it at its creation, * * * and, therefore, what they knew, their creature knew.”

The East Side Land Company, therefore, was impressed with notice of the facts concerning the sale to its grantors, and holds as trustee for the benefit of Mr. Herrmann.

Hoffman Coal Co. vs. Cumberland Coal Co.,
16 Md. 456.

Bank vs. Gray, 84 Ky. 565.

II.

The Court Erred in Holding That Hall Contracted to Sell the Land to Sengstacken and Smith, on May 17, 1905; That Hall's Duty to His Principals Thereupon Ceased, and That He Was at Liberty Thereafter, and Before the Deed Conveying the Property to the Title Guarantee & Abstract Company, Trustee, Was Delivered, to Speculate With the Subject Matter of His Agency.

1. *In the first place, there is no evidence herein showing that Hall contracted to sell the land to Sengstacken and Smith, on May 17, 1905, as claimed by defendants.*

The only witnesses who testified concerning the alleged transaction were Sengstacken, Smith and Hall. In substance, their testimony is to the effect that Hall agreed to sell the Holcomb tract to Sengstacken and Smith, on May 17, 1905, for the sum of \$4400.00; that Sengstacken and Smith gave him their joint promissory note for \$100.00, payable in ten days, to bind the bargain; and that Hall, in return, gave them a receipt for \$100.00. Defendants claimed that the receipt set forth and contained the terms of their agreement.

Sengstacken's testimony on this question is set forth in full in the Transcript, on pages 307-308,

311-312, 326; Smith's, on pages 274-275, 292-293, and Hall's, on pages 229-233, 261.

The defendants did not introduce the receipt in evidence. And they did not show that it was lost and could not be found, or that it was executed or subscribed by the parties to be charged, or give the contents of its provisions.

Sengstacken said that the receipt was delivered to him by Hall. He then testified as follows (T., p. 311):

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. I have been looking for it, but I have been unable to find it. Since that transaction, I have moved my office three times. The last time I moved from Flanagan & Bennet Building, considerable of my old papers were in the back room and rained upon, and in moving into the new quarters where I am now, I destroyed considerable of my old records, which I thought were past age, and I had no further use for, and some without overhauling, and it is *possible* it may have been destroyed, *and it is possible I may have it yet among my papers*. At any rate, I haven't been able to locate it.

Q. Have you made a careful search for it?

A. I made *quite* a search.

The witness did not say that the receipt was lost or destroyed. He merely said that it was "possible" it might have been destroyed. And he thought that "it is possible I may have it yet among my papers." Why did he not search for it among his papers then? The fact that he thought that he might yet have it among his papers shows very plainly that he did not make a diligent search for it where he thought it might be found, or else he would have known that it was not there. And he did not say that he had made a careful search for it. He made "quite" a search. That might mean anything or nothing.

The law will not permit proof of contents of a lost instrument upon such a showing as presented by this witness' testimony. Before secondary evidence is admissible, it must first be shown that a bona fide search has been made for the lost writing, and "that the party has exhausted, to a reasonable degree, all the sources of information and means of discovery naturally suggested by the nature of the case, and accessible to the party."

The point is well illustrated by the case of *Blondeau vs. Sheridan*, 81 Mo. 545. In that case, the court said (p. 556):

" * * * Hastings testified as follows: 'I had the original contract handed to me by McGee. I don't know what has become of it; don't remember what I did with it; I may have the paper somewhere; I have looked for it.'

“Courts are not very strict in their rulings upon this question, but to permit copies or original papers to be read as evidence, on such foundation as that laid here would be in effect, to abrogate the rule altogether. There must be proof of such a search for the original, by the party who had custody of it, as reasonably warrants the conclusion that it has either been destroyed, lost or mislaid, and cannot be found. Where the witness states that he may have it in his possession it shows that, notwithstanding he has looked for it, he may, by a diligent search in the proper places, find it, and that the search he had made was by no means thorough or satisfactory to himself.”

Folsom's Ex. vs. Scott, et al., 6 Cal. 460.

Bascom vs. Turner, 5 Ind. App. 229.

Holbrook vs. School Dist., 28 Ill. 187.

Sengstacken's failure to show that the instrument in question was lost or destroyed, and could not be found by diligent search, therefore, renders inadmissible any secondary evidence concerning the alleged agreement.

Furthermore, it does not appear by the evidence that said receipt was subscribed by Hall as agent for the Herrmanns, or by Hall individually, or by any one, or at all. Hall testified, on direct examination (T., p. 231):

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I *made out* a receipt for \$100.00 on the purchase price of this particular tract of land.

To “make out” an instrument and to “*subscribe*” it are two different things. And neither Sengstacken nor Smith said that the instrument was signed.

This also precludes the right of consideration of secondary evidence regarding the contents of the alleged instrument.

“The loss of the paper is first to be proved; then the *execution* in the same manner as if produced.”

Shrowders vs. Harper, 1 Har. (Del.) 444.

“It is not competent to introduce testimony concerning the contents of a receipt, purporting to be signed by a party against whom it is set up as a matter of defense, in the absence of evidence tending to show the genuineness of the signature to the receipt.”

Holman vs. Borchers, 24 Mo. App. 629.

Helton vs. Asher, 103 Ky. 730.

Moor vs. Gray, 42 Me. 29.

Edwards vs. Noyes, 65 N. Y. 125.

Porter vs. Wilson, 13 Pa. St. 641.

Smith vs. Smith, 106 Ga. 303.

And defendants did not, in fact, prove a single term, condition or provision of the missing instrument. The witnesses testified concerning negotiations they claimed to have had before and at the time they entered into the alleged agreement, but they did not even attempt to state the language or give the substance of the contents of the alleged receipt or memorandum itself.

Hall testified as follows (T., p. 229):

Q. When were the final negotiations instituted resulting in this transfer?

A. It was in May, 1905.

Q. For the purpose of refreshing your memory as to dates, I hand you a promissory note taken from the possession of Henry Sengstacken, dated Marshfield, May 17, 1905, for \$100.00, payable to the order of Hall & Hall, and ask you to examine that and then state if you can say when the first negotiations were made resulting in the sale of this property?

A. Well, the negotiations probably a few days before this letter—before this note was made, but on this date we closed the deal; I sold the property, agreed to sell it to Sengstacken and Smith.

Mr. St. Rayner: Wait a minute, excuse me, I would like to know if there was any written agreement.

Court: Ask him about that.

Mr. St. Rayner: I object to any oral testimony being given of the nature of the sale of this property.

Court: He is not proving title, he is proving when negotiations began. This doesn't prove title, of course.

Q. Do you recognize this note?

A. I recognize this note, except this handwriting there; that wasn't made that day, but the note itself, I recognize the note as being—

Court: What date is that?

A. May 17, 1905.

Q. That is, the handwriting across the face, "Paid on purchase of land, Mrs. Dora Herrmann." You don't recognize that?

A. No, I don't recognize that; no.

Q. Where did you see that note before?

A. That note was given to me by Mr. Smith and Mr. Sengstacken on May 17, 1905.

Q. For what purpose?

A. On the purchase price of the Herrmann claim—the Holcomb claim.

Q. At what price?

A. \$4400.00.

Q. Was this note signed, and by whom?

A. Henry Sengstacken and L. D. Smith.

Mr. Peck. We offer the same in evidence.

Mr. St. Rayner: We object on the ground that it is incompetent.

Court: Objection overruled.

Mr. St. Rayner: It is not the best evidence of a transaction for the sale of realty, and is irrelevant in this case.

Court: The objection will be overruled and it will be put in the record.

Note marked "Defendant's Exhibit BB."
(Which is hereto attached and made a part hereof.)

Q. Was there any written memorandum made at the time, signed by yourself, in the nature of a contract or receipt, or otherwise, with reference to this transaction?

A. I made out a receipt for \$100.00 on the purchase price of this particular tract of land.

Q. Where is that receipt?

A. I gave it to Mr. Sengstacken, I haven't seen it since.

Q. Did he surrender it to you when the transaction was finally consummated?

A. He did not.

Q. Have you made a search for that paper?

A. I looked over my office and haven't got it there, and I don't have any recollection of his ever returning it to me; I don't think he did. In fact, I am positive it wasn't returned.

Q. *Were there any conditions attached to this sale of any nature?*

Mr. St. Rayner: I object to any testimony of an oral nature.

Court: I haven't seen the bill of complaint in this case, but I understand you are charging actual fraud; you are charging that this land was purchased by these people by actual fraud.

Mr. St. Rayner: We charge that they pretended to purchase the land on the 30th of August, 1905.

Court: This you charge was a fraudulent transaction?

Mr. St. Rayner: We also charge it as a fraudulent transaction, between a fiduciary agent—between a principal and agent. The agent reserving at the time of sale—

Court: You base your right to recover in this case solely on the fact that Hall was the agent of Mrs. Herrmann?

Mr. St. Rayner: No, that is only one of the grounds.

Court: The other ground is the actual fraud?

Mr. St. Rayner: The other ground is the actual fraud.

Court: Very well, then it is quite important that we should know all the facts, and this evidence is perfectly competent if that is the charge.

Mr. St. Rayner: What we object to in this, however, is for the defendant attempting to prove by oral testimony that there was an oral agreement between Mr. Hall, as attorney in fact of Mr. and Mrs. Herrmann, and Mr. Sengstacken and Mr. Smith, in selling this property. It is in contravention of the statute.

Court: Certainly it probably would not amount to a legal contract, but as a fact in this case, as it bears on the question of fraud, and for that purpose, it is competent.

Mr. Peck: *I will withdraw the question.*
Sengstacken testified (T., p. 307):

Q. Now relate, in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman (Holcomb) tract to yourself and associates?

A. * * * I met Ren Smith in town one day. * * * So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on

time. He said he would take \$4400.00, so we agreed to take it on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for \$100, as part payment of the land.

Q. Is Defendant's Exhibit BB that note?

A. Yes, sir, that is the note.

Q. Did you make out that note?

A. I made that note out.

Q. And did you put the endorsement across the face here, "Paid by purchase of land. Mrs. Dora Norman?"

A. I did that when it was redeemed, yes.

Q. On August 30, 1905, did you make that endorsement?

A. Yes, when I got the note back. I don't know the exact date.

Q. Did you cut the signatures off that date?

A. I did. That is the way I generally cancel my notes; cut the name off.

Q. Whose names were signed to that note before you cut them off?

A. Henry Sengstacken and L. D. Smith.

Q. *Now, proceed with your testimony.*

A. *When we paid him the note, my recollection is that we took a receipt for \$100 on account, describing the land and the terms, and subsequent to that we proceeded to interest other people in the deal.* * * *

* * *

Q. Where is the receipt which was given you by John F. Hall on May 17, 1905?

A. I don't know. * * * It is possible it may have been destroyed, and it is possible I may have it yet among my papers. * * *

Q. Have you made a careful search for it?

A. I made quite a search.

And Smith testified as follows (T., p. 274):

Q. I hand you Defendant's Exhibit BB, and ask you if that is the note that you gave at that time?

A. Well, it must be. The signature is gone, but that is undoubtedly the note.

Q. Did any other papers pass between you and Mr. Hall, or Mr. Sengstacken and Mr. Hall, at that time?

A. Well, *I wouldn't know as to that, because I—so far as attending to the business, the legal part of it, I paid no attention to that whatever.* That has been a long time ago, and I *just presume* of course, that Mr. Sengstacken

took the proper papers, and that Mr. Hall being a lawyer too—*I didn't pay any attention to that part of it.*

This is the sum total of the evidence introduced by defendants to prove the alleged agreement. Can the court tell from this what the terms of the missing instrument were? Who were the vendors or vendees named herein? Was the land to be conveyed to Sengstacken and Smith, or to the Title Guarantee & Abstract Company? What was the consideration stated in the instrument? When was the contract to be performed? When was the first payment to be made? When were the deferred payments, if any, to be made? Were the deferred payments to be secured by a mortgage, or otherwise? And if they were to be secured by mortgage, who was to execute the mortgage—Sengstacken and Smith, or either of them, or the Title Guarantee & Abstract Company, or who? Were the vendors to execute a deed of the property, and, if so, what kind of a deed—a warranty, a bargain and sale, or a mere quitclaim? And who were to be the grantees named in the deed, if a deed was to be given—Sengstacken and Smith, or the Title Guarantee & Abstract Company, or who? And what were to be the covenants of the deed, and how many? And when was the deed to be delivered—when the purchase was fully paid, or when the first payment should be made, or when? And was the deed to contain any obligations or conditions to be carried

out by either the vendors or vendees, and, if so, what were they? The evidence is entirely silent on all these things.

Hall was asked if there were "any conditions attached to this sale of any nature." (T., p. 231-232.) And after counsel for complainant objected, counsel for defendants withdrew the question. *And no further question was asked witness on that subject.*

After testifying concerning negotiations he claimed to have had with Hall at the time he entered into the agreement, Sengstacken was then asked concerning the writing evidencing the alleged agreement, and he testified: "Q. Now proceed with your testimony." "A. When we paid him (Hall) the note my recollection is we took a receipt for \$100 on account, describing the land and the terms. * * * But the witness did not make known *what* the description and the terms set forth in the receipt were. He did not state either the language of the instrument or even the substance of its provisions.

And Smith admitted that "I didn't pay any attention to that part of it." (T., p. 274-275.)

This evidence is clearly not sufficient to prove a contract for the sale of land under our law. The Statute of Frauds of the State of Oregon provides that any agreement for the sale of real property, or any interest therein, is void, unless the same or

some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged or by his lawfully authorized agent. The statute further provides that no evidence of such agreement is admissible, other than the writing, or secondary evidence of its contents. (Lord's Oregon Laws, Sec. 804, 808. These provisions are set forth in full herein, on page 59.

And the rule is well established that the note or memorandum must be certain and definite in its terms and provisions in order to satisfy the requirements of the statute. The Supreme Court of Oregon has stated what is necessary for the memorandum to contain, in the case of *Catterlin vs. Bush*, 39 Or. 496, in the following language (p. 501):

“ * * * The statute requires that, in case of an agreement for the sale of real property or any interest therein, there shall be some note or memorandum thereof in writing, expressing the consideration and subscribed by the party to be charged, and no evidence will be received of such agreement, other than the writing or secondary evidence of its contents: *Hill's Ann. Laws, Sec. 785.* (Lord's Oregon Laws, Sec. 808.) The memorandum and the contract or agreement are not to be confounded as one and the same thing. The memorandum is understood to be a note or minute informally made of the agreement, which may have but a verbal existence, expressing briefly the essential terms,

and was never intended to stand as and for the agreement itself. The necessary elements are that it must contain the essential terms of the contract, expressed with such degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. * * * Accordingly, *it must show who are the contracting parties, intelligently identify the subject matter involved, express the consideration, be signed by the party to be charged, and disclose the terms and conditions of the agreement.* * * *

Judge Valentine states the rule very clearly, in *Frye vs. Platt*, 3 Pac. (Kan.) 781, in the following language (p. 783):

“* * * the only evidence of the supposed contract between the plaintiff and the defendant, and the only instrument to which plaintiff is privy, is the receipt given by Eads to plaintiff; and this receipt, as a contract, is certainly very indefinite and uncertain. The receipt says: ‘*Received of J. B. Frye \$50, for part payment of purchase money for Sec. 1, T. 25, R. 14, Woodson Co., Kas.*’ Now what was the total amount of the purchase money? How was it to be paid? To whom was it to be paid? When was it to be paid? How was the deferred payment, or payments, to be secured? Was any interest to be paid, and, if so, at what rate? Nothing is shown with regard to these matters. The receipt is entirely blank with reference to

the consideration. But suppose that the consideration were considered definite and sufficient, and that at some future time it should be paid or tendered, then what should be done? Should a deed be executed for the land, or a release, or merely a receipt given for the money? And if a deed should be executed, then what kind of a deed—a quitclaim deed or a warranty deed? And what should be the covenants in the deed, and how many? And by whom should the deed be executed? * * *

In *Williams vs. Morris*, 95 U. S. 444, the court said (p. 456):

“Unless the essential terms of the sale can be ascertained *from the writing itself*, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. * * *

See also:

Ross vs. Allen, 25 Pac. (Kan.) 570.

Sheid vs. Stamp, 34 Tenn. 172.

Lippincott vs. Bridgewater, 55 N. J. Eq. 208.

And no less evidence of the contents of the written instrument, when the original is lost, will satisfy the demands of the law. The terms of the contract cannot be inferred, they must be affirma-

tively proved. The instrument must be substantially reproduced in all its essential parts.

Thus in *Tayloe vs. Riggs*, 1 Peters (U. S.) 591, Mr. Justice Marshall said:

“When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the position of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.”

In *Carpell vs. Fagan*, 77 Pac. (Mont.) 55, the court said:

“* * * The word ‘contents’ used in this statute (the Oregon statute uses the same term) evidently includes all the substantial parts of the lost instrument, and therefore *proof of such contents requires a practical reproduction of the instrument in all its substantial parts*. The law is well settled that proof of negotiations and conversations and acts of the parties be-

fore, at the time of, and after the execution of the written instrument are not competent to prove its contents, where the instrument is lost.”

In *Scurry vs. Seattle*, 56 Wash. 1, the court said :

“* * * In order to establish a lost instrument on behalf of the party asserting rights under it, the evidence must be clear and positive, and of such a character as to leave no reasonable doubt as to the terms and conditions of the instrument. *It is not enough that it be established that an instrument containing some form of limitation at some time existed, nor is it enough that some witness is able to state his understanding of the legal effect of the instrument; the contents of the instrument must be substantially proven, and with such clearness that the court can determine its legal effect from the language used therein.*”

In *Edwards vs. Noyes*, 65 N. Y. 125, the court said :

“* * * Parol evidence to establish the contents of a lost deed should be clear and certain. *It should show that the deed was properly executed with all the formalities required by law, and should show all the contents of the deed, not literally, but substantially.* If anything less than these requirements would suffice, evil practices, which it was the object of the statute to prevent, would be encouraged.”

Nicholson vs. Tarpey, 89 Cal. 617.

McCarthy vs. Kyle, 4 Coldwell's Rep. (Tenn.) 348.

Rankin vs. Crow, 19 Ill. 626.

Hooper vs. Chism, 13 Ark. 496.

Applying these rules to the case at bar, the defendants herein have utterly failed to prove their alleged agreement. The writing itself evidencing the agreement was not introduced in evidence by defendants; they did not show its loss; they did not show that it was subscribed as required by the statute; and they did not show any of its terms, conditions or provisions. The agreement is, therefore, void under the statute of frauds. And defendants' contention that Hall contracted to sell the land in question to Sengstacken and Smith on May 17, 1905, and their further contention that Hall's duty to his principals ceased at that time by reason of that fact, is, therefore, without foundation or merit, and must, of course, fall to the ground.

Complainant further contends that defendants not only failed to prove their allegation respecting the agreement between Hall and Sengstacken and Smith, by showing a valid contract under the statute of frauds, but that their claims in respect thereto are absolutely false in fact.

This is shown by Hall's own letter to Mrs. Herrmann, written on May 19, 1905, two days after the alleged transaction is claimed to have been consummated. He wrote (T., p. 220):

"Hall & Hall,
Attorneys at Law,
Marshfield, Oregon.

May 19, 1905.

Mrs. Dora Herrmann,
Tedan Street,
Hildesheim, Hanover, Germany.

Dear Madam:

* * *

"* * * There is now considerable talk
about land and we have a good prospect of
selling the Holcomb tract for four thousand
dollars. * * *"

* * *

"HALL & HALL."

If Hall had contracted to sell the land to Sengstacken and Smith, on May 17, 1905, for \$4400.00, would he have written this kind of letter to his principal two days afterwards? If he had contracted to sell the land, then is the time he would have informed her of that fact. But he said nothing about having agreed to sell it to Sengstacken and Smith, or anyone else. He said that there was a "good prospect" to sell it, not because anybody had agreed to purchase it, but because "there is now considerable talk about land." Mr. Hall is a lawyer. He knew the meaning of the language and terms he used. He knew the difference between a *contract* and a mere "prospect." And if he had contracted to sell it for \$4400.00, he certainly would not have written Mrs. Herrmann immediately thereafter that there was considerable talk about land and that

there was a "good prospect" of selling it for only "four thousand dollars"—*four hundred dollars less than the alleged contract price.*

This letter shows why defendants were unable to produce the writing evidencing their agreement, and it explains why Sengstacken, Smith and Hall made such faint effort to find the missing instrument, and why they were unable to state its contents. Defendants' contract was a myth.

2. *But even if Hall had agreed to sell the land to Sengstacken and Smith, on May 17, 1905, as claimed by defendants, yet his duties in respect thereof would not have ceased or terminated at that time or by reason of that fact, and he was not at liberty thereafter, and before the deed of the property was executed and delivered, to speculate with the subject matter of his agency.*

Hall's duty did not cease until the purpose for which he was employed was fully performed and executed. In other words, his obligations did not terminate until he executed and delivered the deed conveying the land to the Title Guarantee & Abstract Company, trustee, and received payment therefor, on August 31, 1905. Hall was not a broker. He was not employed merely to find a purchaser. He was employed and authorized to both *sell and convey* the property of his principals. In the language of his power of attorney, the Herrmanns vested him with authority (T., p. 31-33).

“for them and in their names and as their act and deed to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, * * * bonds, notes, receipts, evidences of debts, releases and satisfaction of mortgages, * * * and other instruments in writing of whatever kind and nature.

“Giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as they might or could do if personally present, * * *”

And Hall did, in fact, perform other acts in furtherance of his agency after May 17, 1905. Subsequently, he executed and delivered the deed to the Title Guarantee & Abstract Company, trustee. He also executed covenants of warranty and against encumbrances, obligating his principals to respond thereto. And he accepted part of the purchase price of the property, and the note and mortgage of the Title Guarantee & Abstract Company, trustee, for the balance thereof. And it is by reason of these very acts performed by Hall, all subsequent to the time that defendants assert that his duties as agent ceased, that defendants themselves are now claiming title to the land. If Hall's obligations terminated at the time contended

by defendants, then all his subsequent acts must have been without authority and void.

Nor were Hall's duties after the time of the alleged agreement (assuming that there was in fact an agreement as alleged) merely passive and formal. They were both active and potential. He was bound to be vigilant in safeguarding the interests of his principals in the performance or execution of the contract itself. It was his duty to keep intact the title of the property to abide the obligations of the agreement. He was bound to see that the obligations of his principals were not increased, and that the prospective vendees did not escape performance of any of their covenants. He was bound to see that no covenant, undertaking or condition on behalf of his principals was embodied in the deed which was not required by the contract. It was his duty, if the agreement was procured by any species of fraud or misrepresentation, to repudiate and refuse to carry it out, on behalf of his principals. And if, for any reason, the intending purchasers were unable to perform, or the contract could not be enforced against them, then it was Hall's duty to sell the land to someone else at the best price obtainable, when opportunity offered. It was also his duty to execute and deliver a deed and to accept the purchase price, in conformity with the exact obligations of the contract. In short, Hall was bound to act as faithfully and diligently in the interests of Mr. and Mrs. Herrmann as if he were

selling his own land—"to do and perform all and every act and thing whatever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as they might or could have done if personally present."

The rule of law applicable is well stated in the case of *Wing & Evans vs. Hartupée*, 122 Fed. In that case, Hartupée, while acting as agent and trustee for the sale and conveyance of certain stocks and bonds of the Pittsburgh Plate Glass Company, contracted to sell a certain portion of such stocks to one Pitcairn. Subsequently, but before the contract was performed and the stock delivered, Pitcairn agreed to re-sell a portion thereof back to Hartupée. The court said (p. 900):

"It need scarcely be said that defendant Hartupée could not have bought the stock directly from himself as trustee, except with the consent of all persons interested therein. The equitable rule that makes a purchase voidable at the option of the *cestui que* trust is founded on policy, and does not involve or compel an inquiry into the good faith of the transaction.

* * *

* * *

"There are hosts of authorities to support this proposition, but it is enough to cite the absolutely considered case of *Michoud vs. Girod*, 45 U. S. (4 How.) 503, 11 L. Ed. 1076.

“A slight extension of the rule is sufficient to cover such a case as is now presented, and, in our opinion, such an extension is justified by the same consideration of policy that moved the courts to lay down the rule originally. Where the legal title of the trust property still remains in the trustee, so that his duty of care, protection and oversight continues, we think he should be disabled from acquiring that title for himself, *even though he may have agreed to sell it to a third person, and by a subsequent contract with such person may have taken the conveyance of his equitable right.* The danger in such a transaction differs little in degree from the danger that lurks in a sale directly by the trustee to himself; and the uncovering of fraud, if fraud there should be, in the formal sale and purchase, would be nearly as difficult in the one case as in the other. Indeed, it might be more difficult, for, supposing fraud to exist, the conspirators would be likely to support it by their oaths, and the good faith of the transaction would therefore be sworn to by two false witnesses, instead of by one only. The duty of a trustee does not cease when he has made an agreement to sell the trust property. Until the contract is executed and the conveyance actually made, his obligation is not merely passive and formal, but continues to be active and imperative. He must still preserve and care for the trust estate, so that it may be forthcoming to answer the agreement; and he is bound also to be vigilant concerning the agree-

ment itself, so that the intending purchaser may neither evade his own obligations, nor improperly increase the obligations of the trustee. *So long as the agreement is executory*, there is a necessary and wholesome relation of hostility between the purchaser and the trustee, which should not be diminished, but would inevitably disappear altogether the moment the trustee himself became interested in carrying the agreement into effect. Suppose the contract had been procured by fraudulent representations on the part of the purchaser, or that, for any other legal or equitable reason, the trustee would not only be justified in opposing, but required to oppose, its execution. Under such circumstances, he would obviously be taking a position antagonistic to his duty, if he were permitted to engage his personal interest on the side of the purchaser. Moreover, there are such things as tacit understandings, insidious suggestions, hints that are sufficient between shrewd and unscrupulous men, that never reach the stage of agreements, and are yet of potent force and effect. It is obviously safer to disable a trustee from profiting by such undertakings, than to expose him to the temptation of misconduct that would be so difficult to expose, and to lay upon the cestui que trust a task, which would often prove impossible, of tracing the hidden course of an ingenious plot purposely kept vague and ill defined.

“ * * * We do not deny that there is an appearance of arbitrariness in drawing the line at the passing of the legal title, disregarding what may be the real and substantial agreement; but as the rule disabling a trustee from dealing with the trust property for his own advantage is founded on policy, and not upon logic, the mere appearance of arbitrariness need not be alarming. *It is a working rule that is needed—one that is convenient and safe to apply*—and, after much consideration, we think the test that had been indicated, namely, *whether the legal title has or has not passed, should determine what action a court of equity must take when it appears that a trustee has repurchased an interest in the trust estate from the person to whom the interest has been sold. If the legal title has not yet left the trustee, the contracts between the parties having dealt with the equitable title only, the transaction is voidable at the option of the settlor or trust, without inquiry into its good faith.* If the legal title has passed, however, and was then reconveyed, the question is one of fairness and good faith, to be inquired into in the light of the circumstances of the particular case.”

See also:

Cook vs. Berlin Woolen Mills, 43 Wis. 433.

Parker vs. McKenna, L. R. 10 Ch. App. 96.

In the case at bar, the defendants themselves expressly admit that Hall had an understanding with

Sengstacken, who was acting on behalf of the purchasing syndicate, that Hall was to have an interest in the land, before he delivered the deed conveying the same to the Title Guarantee & Abstract Company, trustee. In the first Answer that defendants filed herein they allege (T., p. 410):

“On August 30, 1905, defendants Sengstacken and Smith reported to John F. Hall that they had formed a syndicate or pool to take over their agreement with him in the matter of purchasing said land, and that said syndicate or pool was made up of the following members, with the following proportionate interests:

J. J. Clinkinbeard.....	two-twelfths
L. D. Smith.....	three-twelfths
Henry Sengstacken.....	three-twelfths
S. C. Rogers.....	(two) one-twelfth
D. L. Rood.....	one-twelfth

making in all eleven-twelfths, and the said defendants, Sengstacken and Smith, requested the said John F. Hall, in lieu of commissions in part to take the remaining one-twelfth interest in said syndicate; the said defendant did take a one twenty-fourth interest with the stipulation that James T. Hall, his brother, should likewise take a one twenty-fourth interest; *thereupon* the interest of said Dora Norman Herrmann and this complainant in said lands was transferred by John F. Hall, their attorney in fact, to the Title Guarantee & Abstract

: Company, a corporation, trustee, *to hold the same in trust for the several aforementioned owners of said syndicate in proportion to their respective interests.* * * * ”

See also defendants' second answer, T., p. 61-64. And Henry Sengstacken testified as follows (T., p. 332):

Q. Well, *after* you had agreed with him (Hall), or he had agreed with his brother, and announced to you that he and his brother would take the one-twelfth, *then you closed the transaction, and executed the deed and mortgage. Is that true?*

A. *Yes, I guess that is correct.*

Thus it is admitted that it was agreed that Hall should have a joint, undivided interest in the land with the other members of the syndicate, before he executed and delivered the deed thereof, on behalf of his principals, to the Title Guarantee & Abstract Company, trustee; that he took his interest directly under and by virtue of the deed which he himself executed in the names of his principals; and that he himself paid part of the purchase price therefor.

The case at bar, therefore, falls squarely within the rule stated in *Wing & Evans vs. Hartupée* and the rules hereinbefore stated prohibiting agents from speculating with the property entrusted to them for sale.

III.

The Court Erred in Holding That None of the Other Members of the Purchasing Syndicate, Except Sengstacken, Knew of the Understanding Between Sengstacken and Hall, Whereby It Was Agreed That Hall Should Have a Share in the Syndicate and a Joint Undivided Interest in the Land, Until After the Delivery of the Deed to the Title Guarantee & Abstract Company, Trustee, and That, Therefore, "They Should Not Be Affected Thereby."

1. *The other members of the syndicate were impressed with constructive notice.*

It is immaterial whether the other members of the syndicate knew of the unlawful understanding between Hall and Sengstacken until after the execution and delivery of the deed to the Title Guarantee & Abstract Company, trustee, or not. They were all impressed with constructive notice.

The record shows that Sengstacken and Smith organized the syndicate. They determined who its members should be. They solicited all the other parties to join. They represented it in all negotiations for the purchase of the land. They fixed the terms of sale with Hall. They examined and accepted the title. They caused the note, mortgage and deed to be executed and delivered. In short, Sengstacken and Smith acted for and on behalf of the other members of the syndicate in everything that was done, both in organizing the

syndicate itself and in purchasing the land. (Answer, T., p. 61-64.) The other members, namely, Rogers, Rood and Clinkinbeard, did nothing more than pay for their respective interests therein, after Sengstacken and Smith negotiated the deal. They had nothing whatever to do with the organization of the syndicate, other than that they agreed to pay for their shares after the purchase should be effected. They had nothing to say as to who the other members of the syndicate should be. And they took no part in the negotiations resulting in the purchase of the land. In fact, they knew little about the deal, except what Sengstacken and Smith reported to them. And they relied upon Sengstacken and Smith in everything that was done pertaining to the transaction. (Clinkinbeard's testimony, T., p. 366; Rood's testimony, T., p. 373-374; Rogers' testimony, T., p. 346-347.)

It is immaterial, therefore, whether the other members of the syndicate knew of the understanding between Sengstacken and Hall or not. They were affected by Sengstacken's act and by his knowledge, whether he informed them thereof or not. The rule is well settled that where one of two or more joint purchasers represents his associates as well as himself in effecting or consummating a purchase for their mutual benefit, the associates are affected with notice of any fact concerning the transaction that comes to the knowledge of the one making the deal.

The rule is well illustrated by the case of McLean vs. Clark, et al., 47 Ga. 24. In that case, McLean sued Clark, Harris and Steadman for the value of certain factory machinery and other property. Plaintiff charged that Clark procured the sale to himself, Harris and Steadman through fraud, etc. All negotiations for the sale were conducted by and between McLean, the vendor, and Clark, on behalf of himself and his associates.

The question of notice was raised by an instruction requested and refused by the trial court.

On appeal, the court said (p. 69-70):

“5. When other persons are let into a trade, made, in form, in the name of another, but, in fact, in consultation with them, and in view of their joint interest, they stand on a different footing from purchasers from the nominal vendee. This is only common sense. Neither equity nor good morals care for the form in which parties see fit to clothe their transaction. *If Clark, Harris and Steadman had consulted together and contemplated a joint purchase, and it was understood they should be jointly interested, and Clark made the purchase, practicing a fraud in so doing, they all take the title tainted with the fraud.* The subsequent arrangement is merely in pursuance of the first understanding. We do not say there was a fraud (the court merely passed upon the correctness of the instruction requested and refused), but if there was, it would be a very

dangerous doctrine to hold that, because they all did not participate, the sale is good as to those who are not to blame. Clark was in fact agent for all. Under the facts proven, it would have been gross bad faith to participate in Clark's purchase, if it was fair. In equity, therefore, he acted for all, for himself and as agent for the others."

See also:

Smith vs. Adams, 4 Tex. Civ. App. 5.

Stanley vs. Green, 12 Cal. 149.

Atterbury, et al., vs. Hopkins, et al., 122 Mo. App. 172.

Richards, et al., vs. Sutter, 125 S. W. (Ark.) 1018.

And in the case at bar, would it not be absurd to say, and a most dangerous doctrine to hold, that the other members of the syndicate should not be affected by the unlawful act of Sengstacken in inducing Hall to commit a fraud on his principals in bringing about the sale for their joint and mutual benefit, merely because they were not informed of the fraud until after the deed was delivered to their trustee? If that were the law, then all that would be necessary to enable a man to defraud another of his property would be for him to have someone else negotiate the transaction for him, and then plead ignorance of his representative's acts.

Furthermore, it cannot be denied that all the members of the syndicate shared the profits of the

purchase effected by Sengstacken and Smith. They are, therefore, bound, if they seek to avail themselves of the benefits of the transaction, to take it tainted with whatever fraud was practiced or undue means employed in bringing about the sale. This is nothing more than justice and common sense.

The rule is stated by the Supreme Court of Oregon, in *Wilson vs. McCarthy*, 134 Pac. (Or.) 1189, in the following language:

“The doctrine is well established and rests upon sound principles of law that a person who seeks to avail himself of the contract made by another for him, whether by appointment or by a self constituted agent, is bound by the representations made and the methods employed by the agent to effect the contract.”

See also:

Presby. vs. Parker, 56 N. H. 409.

Darner vs. Brown, 137 N. W. 461.

Harrell vs. Brooks, 113 S. W. 961.

Krum vs. Bench, 96 N. Y. 398.

Morse vs. Ryan, 26 Wis. 356.

2. *And the Title Guarantee & Abstract Company, trustee for the syndicate, had notice of the understanding between Hall and Sengstacken, at the time the deed was delivered to it. The members of the syndicate were also impressed with notice by reason of that fact.*

It is alleged by defendants that they agreed among themselves, before the sale was made, that the Title Guarantee & Abstract Company should receive and hold the title of the land for their benefit. (Answer, T., p. 62.) And it was conveyed to that company in accordance with such understanding. It is also admitted that Henry Sengstacken was president and general manager of the Title Guarantee & Abstract Company at the time; and that he represented it in the transaction in question. (Sengstacken's testimony, T., p. —.) Therefore, what Sengstacken knew regarding the sale, the Title Guarantee & Abstract Company was impressed with notice of. And notice to the Title Guarantee & Abstract Company, trustee, was notice to its *c'estui que trust*, the members of the syndicate.

The rule is elementary that notice to a trustee of any fact affecting title of property is notice to the beneficiary.

Meyers vs. Ross, 40 Tenn. 59.

Pope vs. Pope, 40 Miss. 516.

Houston Co. vs. Haden, 135 S. W. (Tex.) 1149.

Schofield vs. Cogdell, 113 S. W. (Tenn.) 375.

3. *Defendants claim that all the other members of the syndicate assigned their interests in the land to Sengstacken, Smith and Siglin, who now claim to be the owners thereof. The property is, therefore, subject to all the equities of complainant in their hands, regardless of the fact whether such*

other members had notice of the fraud practiced in effecting the sale to the syndicate or not.

Sengstacken and Smith negotiated the purchase with Hall from complainant and his wife. They caused Hall to violate his trust to his principals in making the sale of the land to themselves and their associates. Sengstacken and Smith now claim to own eleven-twelfths of the property, by virtue of assignments of the interests of the other members of the syndicate to themselves, together with Siglin, who claims to own a one-twelfth interest therein.

Under these circumstances, the land claimed by Sengstacken and Smith is held subject to all the rights and equities of complainant therein. The rule is well established that where the title of property after a transfer, even to an innocent purchaser, re-vests in the original fraudulent grantee, the equitable rights of the original owner re-attach to it in his hands.

O'Dell vs. Rogers, 44 Wis. 136, 180.

Oliver vs. Piatt, 3 How. (U. S.) 479, 485.

Bourquin vs. Bourquin, 120 Ga. 115, 117-119.

Trentman vs. Eldridge, 98 Ind. 525.

Johnson vs. Gibson, 116 Ill. 294.

Talbert vs. Singleton, 42 Cal. 390.

Church vs. Church, 25 Pa. St. 278.

Bank vs. Wilcox, 24 Wis. 671.

Would it not be absurd to say that Sengstacken and Smith should be protected in the possession of

the proceeds of the unlawful transactions which *they* negotiated, merely because their associates and partners in the transaction, whose interests in the ill-gotten gains they are now claiming by virtue of subsequent assignments, were not aware of the manner in which *they themselves* effected the sale? Yet that is the position assumed by defendants in this case.

And defendant Siglin is not an innocent purchaser. Defendants allege in their Answer (T., p. 67):

“That the interest of D. L. Rood was thereafter, for a valuable consideration, acquired by defendant Z. T. Siglin without any knowledge whatever of the facts or circumstances in the matter of the acquisition of the Hall & Hall interest heretofore alleged.”

The evidence, however, does not show that Siglin paid anything whatever for his interest. His testimony is entirely silent on that subject. (T., p. 352-355.) Furthermore, Siglin testified, on cross-examination, that “when he bought his interest in the Norman (Holcomb) tract he was *not positive* who the other owners were” (T., p. 353); *that he did not know whether Hall had an interest in it or not*” (T., p. 353); “that he *made no investigation* to find out who owned the property” (T., p. 353); “that he *thought* that the Title Guarantee and Abstract Company was holding the title to this property as trustee, when he bought his interest” (T., p.

353-4); "that he *thinks* he bought his interest in 1909" (T., p. 354); and that "he *thinks* he got an assignment of the certificate from the Title Guarantee and Abstract Company, showing his interest." (T., p. 354.)

This evidence does not show Siglin to be a bona fide purchaser. The rule is elementary that to entitle a person to the protection of a court of equity, on the ground that he is an innocent purchaser, he must allege and prove that he acquired the property without notice of the rights of the complainant therein; that he paid a valuable consideration therefor, and what the consideration was; and that he acquired the property in good faith. And if he fails to establish or prove any of these things, he cannot be considered an innocent purchaser.

II Pomeroy's Eq. Jur. (1886 Ed.), Secs. 745, 785.

The rule is stated in *Boone vs. Chiles*, 10 Pet. (U. S.) 177, in the following language:

" * * * In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the

denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea show how the grantor acquired title. * * * The title purchased must be apparently perfect, good at law, a vested estate in fee simple. * * * It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser without notice; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out."

Richards vs. Snyder & Crews, 11 Or. 501.

Hyland vs. Hyland, 19 Or. 51.

It requires no argument to show that neither defendant Siglin's averment nor his testimony entitle him to be considered an innocent purchaser under the requirements of these authorities.

We therefore respectfully submit that Christian Herrmann is entitled to the relief prayed for in his Bill of Complaint, and that the trial court erred in dismissing the same.

ROBERT J. UPTON and
ST. RAYNER & ST. RAYNER,
Solicitors for Appellant.

